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STUDIES IN ROMAN LAW.—No. I.

SOLIDARITY AND CORREALITY

SOLIDARITY AND CORREALITY

BY

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PREFACE

THIS volume represents the first of a series of studies which, it is hoped, will eventually embrace a considerable portion of Roman law. A number of subjects touched on more or less incidentally in the present work will be considered at greater length in a monograph entitled *General Observations on the Law of Stipulation*, which I propose shortly to publish. I have also in course of preparation a translation of Professor Riccobono's *Stipulatio ed Instrumentum nel Diritto giustiniano* from vols. 35 and 43 of the *Zeitschrift der Savigny-Stiftung*, which will show English-speaking students the methods pursued in elucidating the law of stipulation by one of the greatest modern masters of our science. It is impossible to exaggerate the debt which research on numerous branches of Roman law owes to Professor Riccobono's efforts, and I take the present opportunity of gratefully acknowledging my personal obligations to this learned and courteous teacher. Another master to whom I must acknowledge special indebtedness is Professor Ernst Levy, of Frankfurt-am-Main. But for the assistance derived from Professor Levy's writings, the present work could never have been accomplished.

The method which I have adopted for indicating what I believe to be interpolations and noting possible restorations will best be explained by means

of a concrete example. Let us take Ulpian. D. (45.2) 3 pr., *infra*, p. 53. For the sake of convenience this pr. is divided into three periods, α , β , γ . If the reader ignores all interpolation marks [], restoration marks $< >$, and italics, he gets the text as appearing in the Digest. Let us now examine the three periods separately.

α . In [*duobus reis promittendi*] $< \sim >$ ¹ frustra
timetur novatio,

¹ *sponsore vel fidepromissore adiciendo*

The square brackets enclosing the words "*duobus reis promittendi*" indicate that in my opinion these words did not form part of Ulpian's original text; the fact that they are in italics indicates that in my opinion the Compilers invented them afresh and did not merely borrow them from some other part of the context. The following mark $< \sim >$ indicates that in my opinion other words originally stood in the place occupied by the preceding "*duobus reis promittendi*," the Compilers having substituted the one set of words for the other. Note 1 shows what I conjecture Ulpian's original words to have been, viz., "*sponsore vel fidepromissore adiciendo*." These words are in italics, because I have imagined them afresh and have not merely borrowed them from another part of the existing context.

β . [nam *licet ante prior responderit, posterior*] etsi
ex intervallo accipiatur, [*consequens est dicere
pristinam obligationem durare et sequentem
accedere*]:

The square brackets enclosing "nam . . .
posterior" have the same effect as before. "Nam"

is in ordinary roman type because, as I conjecture, the Compilers did not invent it afresh, but merely borrowed it from another part of the context, viz., the beginning of period γ ; the remainder of the enclosure is in italics on the same ground as before. The enclosure is not followed by the mark $< \sim >$, because in my opinion the Compilers simply added the words in question, without deleting anything originally standing in their place. The following enclosure "*consequens . . . accedere*" needs no further remark.

γ . [*et*] $< \sim + >$ ¹ parvi refert simul $< - >$ ²
 [spondeant] $< \sim >$ ³ $< - + >$ ⁴ an separatim
 [promittant], cum [*hoc actum inter eos sit*]
 $< \sim >$ ⁵ ut [*duo rei*] $< \sim >$ ⁶ [constituantur]
 $< \sim >$ ⁷ [neque] $< \sim >$ ⁸ ulla novatio
 [fiat] $< \sim >$ ⁹.

¹ nam (from β)

² *cum reo*

³ spondeat

⁴ *vel fidepromittat*

⁵ *ita interrogetur*

⁶ *sponsor vel fidepromissor*

⁷ constituatur

⁸ neve

⁹ fiat

The mark $< \sim + >$ following "*et*" shows that in my opinion the Compilers have substituted this word for something written by Ulpian (\sim), and further that this something now appears (in whole or in part) elsewhere in the context ($+$). Note 1 shows that in my opinion the "nam" now standing at the commencement of β originally stood in this place. "Nam" is not printed in italics in the note, because I have not imagined it afresh. The mark $< - >$ after "simul" shows that in my opinion the Compilers have here deleted something without putting anything in its place. Note 2 shows the deleted words to be "*cum reo*," italicised because I have imagined them afresh. The square brackets

enclosing "spondeant" show that this precise word did not, in my opinion, stand in Ulpian's text, but the fact that only the "*n*" is in italics further shows that this element alone is due to the Compilers. The following mark < ~ > and note 3 show that in my opinion Ulpian wrote "spondeat"; no part of the latter word as standing in the note is italicised because all its elements are found in the Digest text, the Compilers having merely inserted a "*n*." The following mark < - + > indicates that the Compilers have deleted something without putting anything in its place (-), and further that the something deleted now appears (in whole or in part) elsewhere in the context (+). Note 4 shows that in my opinion "*vel fidepromittant*" originally stood here, the Compilers having suppressed the "*vel fide*" and transferred the "promittat" (altered to "promittant") to a little farther down. The remaining marks require no further explanation.

Now let us adopt the opposite course, that is to say, let us print the text of, say, period γ as in our opinion Ulpian wrote it, and mark the Compilers' supposed manipulations thereof:

[~]¹ < nam > parvi refert simul < cum reo >
 [~]² < spondeat > < vel fidepromittat >
 an separatim [- +],³ cum [~]⁴ < ita inter-
 rogetur > ut [~]⁵ < sponsor vel fidepro-
 missor > [~]⁶ < constituatur > [~]⁷
 < neve > ulla novatio [~]⁸ < fiat >.

¹ et ² spondeant ³ promittant ⁴ hoc actum inter eos sit
⁵ duo rei ⁶ constituantur ⁷ neque ⁸ fiet

Again, instead of placing either our restorations or what we believe to be the Compilers' interpola-

tions in footnotes, we may print both side by side in the text thus :

[*et*] < nam > parvi refert simul < *cum reo* >
 [spondeant] < spondeat > (or simply;
 spondea[n]t) < *vel fidepromittat* > etc.

The reader will no doubt find these systems perplexing at first, and may be inclined to regard them as turning textual criticism into a Chinese puzzle. Really, however, they are all designed to bring out the "mosaic" workmanship of the Compilers on the classical texts.¹ I have found them exceedingly helpful myself, and if the reader will persevere with them, I think he will have the same experience.

Finally my best thanks are due to Messrs Oliver and Boyd for the great care they have shewn in the production of this work.

J. KERR WYLIE.

ADVOCATES' LIBRARY,
 EDINBURGH, *September* 1923.

¹ See Riccobono, ZSS., 35, p. 242.

ABBREVIATED CITATIONS

Beseler, G., Beiträge zur Kritik der röm. Rechtsquellen (1910, 1911, 1913)	. . .	Cited as Beseler.
Binder, J., Die Korrealobligationen im röm. und im heut. Recht (1899)	. . .	Binder.
Girard, P. F., Manuel élémentaire de Droit romain (6th ed., 1918)	. . .	Girard, <i>Man.</i>
Krüger, P., Justinian's Institutes	{	Vol. 1 of Corpus Krüger, <i>Inst.</i>
,, Digest		Iuris Civilis . Krüger, <i>Dig.</i>
		(13th ed., 1920).
,, Code	{	Vol. 2 of Corpus Krüger, <i>Cod.</i>
		Iuris Civilis .
		(9th ed., 1915).
Lenel, O., Palingenesia Iuris Civilis (1889)	. . .	Lenel, <i>Pal.</i>
Das Edictum Perpetuum (2nd ed., 1907)		Lenel, <i>Edict.</i>
Levy, E., Die Konkurrenz der Aktionen und Personen im klass. röm. Recht (1918)		Levy, <i>Konk.</i>
Sponsio, fidepromissio, fideiussio (1907)		Levy, <i>Sponsio.</i>
Zeitschrift der Savigny - Stiftung (romanistische Abteilung)	. . .	ZSS.
Bullettino dell' Istituto di Diritto romano	. . .	BIDR.
Vocabularium Iurisprudentiae Romanae	. . .	VIR.
Heumanns Handlexikon zu den Quellen des röm. Rechts (9th ed. by E. Seckel)	. . .	Heumann-Seckel.
Basilika, Heimbach's edition	. . .	Bas., Heimb.

The letters *i.i.*, *i.m.*, *i.f.*, appended to the citation of a text, etc., signify *in initio*, *in medio*, *in fine*, respectively.

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CORRIGENDUM

P. 287 f. In my exegesis of D. (46. 1) 49. 2 I have omitted to take notice of the fact that, as indicated by the word "spopondisset," Papinian dealt with the relation of principal debtor and sponsor, which the Compilers altered to one of principal debtor and fideiussor (see Levy, *Sponsio*, p. 3, n. 6). The validity of my argument is not, however, affected by this omission. The passage in question will be mentioned again in my treatise on Accessoriality.

ERRATA AND ADDITIONAL NOTES.

- P. 4, *note 1*, for "Schertz" read "Scherz."
- P. 5, *note 1*, for "Gheist" read "Geist."
- P. 170, 5th and 6th lines from foot, *delete* "the words 'ex contrario' in
δ also render a slight support to this view."
- P. 178, *add* to the passages quoted, Gai. D. (50. 16) 150.
- P. 187, 3rd line from foot, *after* "the words 'solutione ex hac actione
facta,'" *add* "even though as I believe, the latter are due to the
compilers."
- P. 190, 10th line from top, *after* "interpolated it accordingly," *add*
"Fortunately, however, they inserted a reference to solutio-
consumption (solutione ex hac actione facta) which enables us
to conjecture what Ulpian's original argument may have been."
- P. 236 ff. I regret that when I wrote this exposition of Novel 99, I was
unaware of Partsch's remarks on the subject in Sethe-Partsch,
Demotische Urkunden, Studium zum ägyptischen Wirtschaftsrecht.
- P. 299, *note 1*. The first half of the second volume of Levy's *Konkurrenz*
has been published, but, through circumstances for which I can
hardly be held responsible, I was unfortunately unaware of this
fact at the time of writing.
- P. 324, *note 2*, for "exigere" read "exigi."
- P. 330, 12th line from top, for "the cites" read "and he cites."
- P. 338, *note 2*, for "Gheist" read "Geist."

SOLIDARITY AND CORREALITY

CHAPTER I

INTRODUCTION

§ 1. Modern History of the Correality-Solidarity Doctrine

To students of Roman law no subject is better known than the correal-obligation as the source of a vast and barren literature. The modern history of the problem dates from the year 1827 when Keller published his celebrated work *Litiskontestation und Urtheil*, which was followed four years later by Ribbentrop's *Zur Lehre von den Correalobligationen*. In these works a clear and definite distinction was for the first time drawn between "correality" and "solidarity in the narrower sense" (otherwise called "simple solidarity") as different branches of "solidarity in the wider or general sense." Since then all but isolated writers have admitted the fact of this distinction; the question is, Wherein does its basis lie? "Correal obligations and simple solidary obligations are to be distinguished; on this point no doubt prevails. But as to the dividing principle there exists a wide difference of opinion."¹

With regard to this distinction it must in the first place be observed that the recognition of two classes of solidary obligations (in the wider sense) is in itself perfectly natural. For example, we must

¹ Dernburg, *Pand.* II., § 71; cp. Binder, p. 482.

admit a distinction between the case where A and B by a single joint contract bind themselves as sureties for a debt incurred by a third party, and that where each binds himself as surety for the same debt independently of the other, perhaps without knowing of the other's existence. Again, supposing both A and B contribute to the commission of an injury against a third party, we must admit in theory a distinction between the case where both act in concert and that where each acts on his own account, though how far, if at all, the law will deem it practically expedient to discriminate between these two cases, is quite a different matter. In all this, it will be observed, we come back to the familiar distinction between solidary obligations which are joint and those which are several, a distinction which no mature body of jurisprudence can afford to ignore, though its effects differ widely in different legal systems.

The immediate basis of the Keller-Ribbentrop doctrine, however, depended on observations of the working of process-consumption as the same is presented in the texts of the *Corpus Iuris*. In certain cases it was noticed that *litiscontestatio* between the creditor and one of two or more solidary debtors¹ freed the rest—we shall express this result by saying that process-consumption operates “extensively”—while in other cases it was noticed that the result was the opposite—process-consumption here operates, as we say, “intensively.” On what principle must this antithesis be explained?

¹ Only the passive solidary relation is here of importance. It will be observed that throughout this work I use the terms “creditor” and “debtor” in a wide sense to denote the active and passive parties to any purported obligatory relation, actual or prospective, valid or invalid; strictly speaking, of course, there can be no creditor or debtor unless and until a valid obligation is actually created.

The basis of distinction which Keller discovered and which Ribbentrop worked up into a systematic body of doctrine, may be stated thus : In the classical Roman law, process-consumption operates extensively where we have a single (objective) obligation with a plurality of subjective relations—this is correality ; process-consumption operates intensively where we have a plurality of obligations directed to one and the same juristic end¹—this is simple solidarity. Through this distinction it was sought to reconcile the discordancies which the *Corpus Iuris* presents as regards the general institute of solidarity. Where we have a single obligation with a plurality of subjective relations, any fact (*litiscontestatio*, *acceptilatio*, *solutio*, *novatio*, *compensatio*, etc.) which deprives this obligation of its “objective substance,” dissolves all the various subjective relations. Where we have a plurality of obligations, the fact of one of them being deprived of its objective substance does not per se prejudice the subsistence of the others ; but, as all the obligations are ex hypothesi directed to one and the same juristic end, when this end is satisfied by a single *solutio*, all are extinguished.

The Keller-Ribbentrop doctrine at once gained a wide acceptance and soon established itself as *communis opinio*.² Almost from the first, however, it provoked strenuous opposition. The main point of attack was the conception of a single obligation

¹ As to juristic end, *vide infra*, p. 12, n. 1.

² No doubt one of the main reasons why this doctrine imposed itself so effectively was that it gave a clear utterance to tendencies which had previously been latent in juristic thought. The distinction between “extensive” and “intensive” process-consumption could not escape the notice of the earlier jurists, and Faber, Cujas, and Donellus had operated with the idea of unity of obligation. See Binder’s sketch of the pre-Ribbentrop doctrine, p. 484 ff.

(in the objective sense) with a plurality of subjective relations, which numerous writers pronounced to be untenable, nay even absurd. The view that in correality, no less than in simple solidarity, we have a plurality of obligations, gradually gained ground, until in the second part of last century its adherents were probably in the majority, though the Keller-Ribbentrop doctrine still maintained its position as an article of the orthodox juridical faith.

So the struggle went on. Volume after volume was published, theory after theory was propounded, but as to any possibility of the doctrine being settled on a rational basis there was never a sign. Hear what Ihering, writing in 1861,¹ says on the matter: "Among the most refractory 'legal-figures' which are possessed with a truly demoniacal obstinacy, foremost of all stands the correal-obligation. Do you wish me to cite the literature of the 'common law' on the subject? This citation would fill a note a yard long. Jurists of the present day may be divided into two classes: those who have written on the correal-obligation, and those who have not. The doctrine of the 'Three in One' cannot have caused more brain-racking to the theologians than that of the 'Two or More in One' has caused to our civilians. Have we here one obligation with several subjects on the one side or the other, or are there as many obligations as there are such subjects? Go around and enquire who has not laboured on this problem; count the sleepless nights it has caused to the students of our science. My head swims whenever I dip into this literature, and the more I read of it, the more confused I become. If

¹ Reproduced in *Schertz u. Ernst in d. Jurisprudenz*, 11th ed., p. 8 (erster Brief).

I ever have to decide a practical case on the subject, I shall only be able to do so by absolutely forgetting all I have ever heard or read of correal-obligations. Between the latter and the so-called solidary obligations (in the narrower sense) a prodigious distinction is said to exist as between two-footed and four-footed animals. But if we ask our civilian zoologists how this distinction manifests practically, if the two-footer and the four-footer are put to the plough, the majority of them will, I believe, be unable to give any answer, and will evade the question by saying that zoology has nothing to do with ploughing. From a certain writer on the subject, to whom I had pointed out this defect in his work, I received the following answer: 'The practical side of the question I have fundamentally excluded from my enquiries; I have dealt with the subject purely scientifically.' A juristic writing which fundamentally ignores the practical application of its subject! a cunningly constructed watch which is not intended to go! Just herein lies the mischief; jurisprudence has been forced into a zoology, while really it is the practical art of ploughing with civilian oxen."

Another well-known passage from Ihering may suitably be applied to the literature on the correality-solidarity doctrine¹: "Then there arise opinions and theories which can maintain their life only in the place where they received the same, to wit, in the lecturer's chair, but which, if they venture into the outside world, at once prove that they cannot bear the raw air of reality; opinions and theories in the highest degree ingenious, in the highest degree learned, but also in the highest degree perverted—hot-house plants without sap and energy, bastards

¹ *Gheist d. röm. Rechts*, II(2), 5th ed., p. 324.

of logic and erudition with law, unsound lecture-room jurisprudence."

It is easy for us at the present day to understand the cause of all the confusion. Undoubtedly, as the fragments and constitutions of the *Corpus Iuris* stand, there is an antinomy between certain passages which admit and others which deny the extensive operation of process-consumption, and this antinomy demands explanation. Hence, if a writer rejected the Keller-Ribbentrop doctrine, he was practically bound to construct a correality-solidarity theory of his own, and the number of these constructions was legion. Moreover, Ribbentrop's arguments and textual analyses were so defective that those who adhered to the orthodox juridical faith were compelled to seek for fresh grounds on which it could be supported. In the period of which we are speaking the science of textual criticism, as we now understand it, had not yet been born, and so the greatest legal intellects of the day groped blindly in the dark, ignorant (except to a very small extent) of the only method capable of clearing up the manifold discrepancies which the *Corpus Iuris* presents.

By the last decade of the nineteenth century light had begun to dawn both in Italy and Germany. The monograph of Ascoli, *Sulle obbligazioni solidali*, and that of Eisele, *Correalität und Solidarität*,¹ deserve particular mention as harbingers of a new era in the history of our doctrine. The main position with regard to unity of originating cause² as the foundation of correality, which these and other writers about this period adopt, may be pronounced absolutely sound, though in many points of detail

¹ In the *Archiv für die civilistische Praxis*, 77, p. 374 ff.

² As to "originating cause," *vide infra*, p. 12, n. 1.

more recent criticism has shown their views to be untenable.

In 1899 there appeared another important work, namely, *Die Korrealobligationen im röm. u. im heut. Recht*, by Dr Julius Binder, which sought to eliminate the distinction between correality and simple solidarity altogether. Following in the footsteps of Kuntze,¹ this learned writer deposed process-consumption from the chief seat in our dogma and constructed a single institute of solidarity based ultimately on extensive solutio-consumption. Binder's method and results, it will now generally be admitted, are to a large extent unsound, but nevertheless his work has exercised a considerable influence on subsequent doctrine. Much of his exposition is characterised by great acumen, and his manner of applying textual criticism to the solution of the various problems presented is in many respects praiseworthy.

The year 1918 saw the publication of a work, *Die Konkurrenz der Aktionen und Personen im klass. röm. Recht*, by Dr Ernst Levy, which seems at last to have placed our problem on the fair way to a satisfactory solution. Levy discards the terms "correality" and "(simple) solidarity" altogether, and treats the whole subject under the general heading of Action-concurrence. Two actions are said to "concur," in the wide sense employed by Levy, when they are so related that a question may arise whether litiscontestatio in the one does not extinguish the other. If this question be answered in the affirmative, the concurrence is determined in the sense of (process-)consumption—the two actions stand to one another in a (process-)consumption relation; if it be

¹ *Die Obligation u. die Singularsuccession* (1856); *Die Obligationen u. das ius extraordinarium* (1886).

answered in the negative, the concurrence is determined in the sense of cumulation—the two actions stand to one another in a cumulation relation.

A distinction must, however, be drawn between (i) consumption which operates under the *ius civile* and is specifically described as “civil consumption,” and (ii) consumption which operates merely by virtue of the *officium praetoris* or *officium iudicis*, and is specifically described as “praetorian consumption” or “judicial consumption,” as the case may be. In praetorian and judicial consumption the concurrence is determined in the sense of cumulation under the civil law, but this result is counteracted in equity by the *officium praetoris* or the *officium iudicis*.

Action-concurrence in the foregoing general sense is divided into Action-concurrence in the narrower sense and Person-concurrence. Action-concurrence in the narrower sense takes place when one single party has two or more dissimilar but related rights of action against another single party; for example, A lends a specific article to B, who injures it, so that he (A) has against B both an *actio commodati* and an *actio legis Aquiliae*. Person-concurrence takes place where a single party has similar and related rights of action against two or more parties respectively, or two or more parties respectively have similar and related rights of action against a single party. Person-concurrence is active or passive according as the plurality of parties is on the creditor or the debtor side.

When action-concurrence (in the narrower sense) and person-concurrence are combined, in other words when a single party has dissimilar but related rights of action against two or more parties, or two or more parties have dissimilar but related rights of action

against a single party, a "double concurrence" takes place. For example, A is the exercitor of a ship and B is the magister, both being freemen; C contracts with B, and hence acquires a direct action against B and an *actio exercitoria* against A.

Thus Levy's person-concurrence and the *person*-aspect of his double concurrence are concerned with the same phenomena as the correality-solidarity doctrine. In marked contrast to the theory of Binder, everything here revolves round the determination of a concurrence of actions. In any given case what we ask is, Has *litiscontestatio* an extensive or merely an intensive consuming effect? It is fully admitted, of course, that other facts besides *litiscontestatio*, notably *solutio* and *acceptilatio*, may likewise have an extensive consuming effect, but this result, when it takes place, is simply a corollary of the extensive consuming effect of *litiscontestatio*.

Now, as to the general soundness of Levy's theory, so far as it goes, I entertain no doubt whatever. In the sequel I shall, however, endeavour to prove that the alternatives process-consumption and cumulation were not the only ones admitted by the classical jurisprudence. On the contrary, we seem bound to recognise the existence of a relation in which *solutio*, but not *litiscontestatio*, had extensive consuming effect. Under these circumstances I cannot concur in Levy's proposed elimination of the traditional technical terms "correality" and "(simple) solidarity." We may fully admit that these terms and the distinction between them are connected with one of the most unpleasing chapters of modern doctrinal history; that the term "*conreus*," from which "correality" is derived, is probably to be attributed to the Compilers in the one passage where

it occurs¹; that the term “in solidum,” from which “solidarity” is derived, does not, in the Roman law sources, possess the technical connotation of its said derivative.² Yet the theory which will be developed in the following pages demands the use of technical terms to distinguish two classes of solidary obligations (in the general sense), and it would be altogether unreasonable to abandon those already current and invent others.

If it be objected that the ideas expressed by the terms “correality” and “(simple) solidarity” are quite uncertain—that there is a wide diversity of opinion regarding the basis of the distinction between them—I reply that the basis of distinction as formulated by Keller and Ribbentrop is literally correct, and is indeed the only possible one if we confine our attention to the classical law of Rome. In correality we have two obligations objectively identified so as to form constructively one and the same obligation; in simple solidarity we have two obligations, not objectively identified, but directed to one and the same juristic end.

Let it not, however, for a moment be imagined that we are followers of Keller and Ribbentrop; we adopt their basis of distinction indeed, but that is all. For the rest, the advance of the science of textual criticism during the past thirty years or so entitles us to treat almost the entire literature prior to about the last decade of the nineteenth century in the way recommended by Ihering, namely, by forgetting absolutely all we have ever read in this literature regarding correality-obligations.

¹ D. (34. 3) 3. 3.

² See Levy, *Konk.*, p. 10.

§ 2. The Theory of Solidarity and Correality.

The most pronounced element in the general institute of Solidarity¹ is that which we call "subjective alternativity." This latter expression signifies that a first party, Titius, is entitled to a prestation from a second party, Maevius, *or* to a prestation from a third party, Seius, and so on; or conversely, that M. is entitled to a prestation from T., *or* S. is entitled to a prestation from T., and so on. In the passive case, that is, where the plurality of parties is on the debtor side, the creditor is entitled to exact from any one of the debtors the prestation due by that debtor, but having done so, he has no further right against the others. In the active case, that is, where the plurality of parties is on the creditor side, any one of the creditors is entitled to exact from the debtor the prestation due to himself, but when he has done so, the rights of the remainder are gone.

The idea of subjective alternativity then is that only one of the different passive subjects can be made to render a prestation, and the rendering of a prestation by any one of them has the same effect as the rendering of a prestation by any other; and conversely, only one of the different active subjects can demand the rendering of a prestation, and the rendering of a prestation to any one of them has the same effect as the rendering of a prestation to any other. In short, only one prestation has to be rendered, and it is a matter of juridical indifference by, or to, which of the various subjects it is rendered. Subjective alternativity implies a unity of material

¹ Henceforward, when we use the terms "solidarity," "solidary," "solidarily," alone, we always mean them in the wider or general sense; when the narrower sense is intended, we prefix "simple."

cause, juristic end, economic interest,¹ as between the different obligations, which unity is a necessary element in all solidary relations.

We may, however, take it that this idea of subjective alternativity is not the only factor in solidarity. If, for example, T. were entitled to claim Stichus from M. *or* a sum of x from S., we should hardly describe the two obligations as solidarily related. A solidary relation, as commonly understood, demands what we call "substantial objective equality of obligation," or, otherwise expressed, "substantial equality of prestation." In order to understand the force of these phrases we must consider briefly the manner in which an obligation should be analysed from the Roman law standpoint.

An obligation, regarded as a legal phenomenon, may be analysed, in the first place, into (i) subjects

¹ I must assume the reader to be generally acquainted with these terms (as to "cause," cp. Vinogradoff, *Historical Jurisprudence*, I., p. 22 ff.), but owing to the immense difficulty of the problems which they raise, I shall add three illustrations: (i) Suppose T. sells and delivers certain goods to M. on credit. The "material cause" on which M.'s obligation to pay the price is based, is the transfer to him of the goods by way of sale; the "juristic end" to which this obligation is directed, is the giving to T. of a *quid pro quo* for this transfer; the "economic interest" which this obligation is designed to satisfy, is T.'s just claim to this *quid pro quo*. The cause is qualified as "material" to distinguish it from the "originating" or "constitutive" cause about to be mentioned; the end is qualified as "juristic" to distinguish it from any remote end which the obligation in question may be intended to serve but which has no bearing on the juridical quality of such obligation; the interest is qualified as "economic" to distinguish it from the purely juristic interest which flows from, but does not support, the obligation. (ii) Suppose T. lends x to M. and stipulates from him for this sum. The material cause on which M.'s obligation to make repayment is based, is his acceptance of x by way of loan; the juristic end to which this obligation is directed, is reimbursement of T.; the economic interest which this obligation is designed to satisfy, is T.'s just claim to reimbursement. The specialty in this case is that the obligation depends for its force entirely on the formal negotium of stipulation, and needs no help from its material cause (etc.); in short, it is purely abstract. (iii) Suppose M.,

and (ii) content in the wide sense. (i) The subjects are the parties between whom the obligation exists; these call for no remark here. (ii) The content in the wide sense is the prestation to be rendered together with all modalities affecting its exigibility; it is analysed into (a) object and (b) content in the narrow sense, these elements being particularly described as obligation-object and obligation-content, by way of contrast to the prestation-object and prestation-content about to be mentioned. (a) The obligation-object is the prestation—the *aliquid dare* (*dari*), *facere* (*fieri*), or *non facere* (*non fieri*)¹—considered apart from all modalities affecting its exigibility. (b) The obligation-content consists of the last-mentioned modalities. The most important of these are suspensive conditions which render the obligation “imperfect”—make the exigibility of the

wishing to confer a gratuitous benefit on T., promises by stipulation to give him X. Here the material cause, juristic end, economic interest, are purely ideal. As material cause we can only assign M.’s motive of liberality, as juristic end we can only assign the carrying out of this motive, as economic interest we can only assign the just claim which this motive must be deemed to confer on T.

With material cause there must not be confused what we call the “originating” or “constitutive” cause of an obligation (and also of the action by which the obligation is sanctioned), namely, the dispositive fact out of which the obligation (action) arises. Thus, in the first of the foregoing examples the originating or constitutive cause of M.’s obligation is the contract of sale; in the second and third examples it is the stipulation. The difference between material (causal, concrete) and abstract contracts lies in this, namely, that in the case of a material contract (*e.g.*, a sale), the originating or constitutive cause of the resulting obligation contains the material cause (*etc.*) thereof, while in the case of an abstract contract (*e.g.*, stipulation), it does not.

The foregoing points will be discussed in the *General Observations* which I propose to publish (*vide supra*, p. vii.). The term “*causa civilis*” is best avoided; cp. Girard, *Man.*, p. 450, n. 1.

¹ It is quite immaterial whether we use the active or the passive voice in such connections; perhaps the passive is preferable as having a more abstract connotation.

prestation altogether problematical—and suspensive terms (dies) which render the obligation “immature”—cause the exigibility of the prestation to be postponed. Resolutive conditions and terms seem also to belong to the obligation-content.

In the case of obligations *dari*, the obligation-object or prestation must be analysed into two elements, (α) object and (β) content, which are particularly described as prestation-object and prestation-content by way of contrast to the obligation-object and obligation-content. (α) The prestation-object is the thing, physical or ideal, of which the obligation “disposes.” (β) The prestation-content is the “disposition” itself which includes:—the act of “giving” abstracted from any object; all modalities affecting such act (*e.g.*, a provision as to the place of payment¹); and also all provisions, express or implied, as to “secondary” liability, should the act be not duly performed.

Certain obligations *feri*, for example an obligation *rem tradi*, for the purposes of analysis correspond exactly to obligations *dari*, being excluded from the latter category solely on account of the narrow technical significance of *dare*.² Other obligations *feri* fall less naturally into the scheme marked out for obligations *dari*; in particular, if we adhere to the analysis of prestation into object and content, we have to construct a somewhat artificial prestation-object. For example, in the case of an obligation *domum aedificari*, the house itself must be regarded as the prestation-object, though at the time of con-

¹ *Vide infra*, p. 76.

² “to make a thing the property of the recipient”; cp. Heumann-Seckel, s. v. *dare*, 1) e) β), p. 120. As to the phrase *dare operas*, see Biondo Biondi, *Iudicium Operarum*, p. 7 ff.

stituting the obligation its existence is purely prospective; again, in the case of any obligation for rendering a certain quantity of service, the service itself, or, otherwise expressed, so many units of labour, must be regarded as the prestation-object.

In the case of obligations *non fieri*, where the prestation is a forbearance, the analysis of such prestation into object and content is altogether unnatural and should not be attempted.

The foregoing analysis takes no account of the binding element—"vinculum iuris," "oportere"—which is assumed to be present in every obligation, and the nature and origin of which cannot be discussed here. An exact synonym for obligation, as above represented, is "obligatory relation." The substantive right of the creditor may be described as his "obligatory right," by way of contrast to his adjective right of suing on the obligation, called briefly his "action right." Conversely, the substantive liability or duty of the debtor may be described as his "obligatory liability or duty," by way of contrast to his adjective liability to be sued, or duty of joining issue¹ in an action brought against him, called briefly his "action liability or duty." The term "obligation" may be used loosely in the sense either of "obligatory right" or of "obligatory liability or duty"; also in that of a conventional obligatory fact (*i.e.* contract), and in various other senses.

In the present treatise we shall be concerned for the most part with obligations *dari*. When we have occasion to mention obligations *fieri*, we shall assume the same mode of analysis to be applicable in their

¹ The English terms "join issue," "joinder of issue," may conveniently be employed to translate *litem contestari* (*iudicium accipere*) and *litis contestatio*.

case as in that of the former. Obligations *non fieri* lie without the scope of our enquiry.

We are now in a position to consider the meaning of "substantial objective equality of obligation," or "substantial equality of prestation," as an element in solidarity. In order that two obligations may have substantially equal objects or prestations, the following conditions must be fulfilled: (i) the two prestations must be homogeneous in the sense that each must contain the same category of act¹; thus an obligation *dari* cannot be equal to any obligation *fieri*, and, among obligations *fieri* themselves, an obligation *tradi*, for example, cannot be equal to an obligation *aedificari*; and (ii) the two prestation-objects must be equal, either *in toto* or *pro tanto*.

In order to understand the second of these conditions, we must in the first place consider the distinction between "generic" and "specific" prestation-objects. A prestation-object is generic when it consists of a sum of money, a quantity of some other fungible genus, or, we must add, an indeterminate species of a non-fungible genus (*e.g.*, a slave generally). A prestation-object is specific when it consists of a determinate species. The basis of this distinction lies in the fact that a specific thing (*e.g.*, the slave Stichus, the fundus Cornelianus) has, while a generic thing (*e.g.*, x sestericia) has not, an "individuality" of its own apart from its position as prestation-object of a particular obligation. A generic thing is endowed with concrete existence simply for the purposes of the particular obligation; a specific thing has already an independent concrete existence which the obligation does not affect.

For our present purposes the fact which we have

¹ We omit all further reference to forbearance (*non fieri*).

to observe is this, namely, that while on the one hand two generic prestation-objects may be equal though quite distinct, *e.g.*, one sum of x is equal to another sum of x , on the other hand juristic equality of specific prestation-object is impossible without identity thereof. Thus, two obligations, *Stichum dari* and *Pamphilum dari*, have not equal prestation-objects in the juristic sense, even though economically the two slaves may be of exactly the same value; the individuality of a specific thing prevents it being regarded as juristically equal to another specific thing.

In the second place, as already indicated, the equality of which we are speaking may be either *in toto* or *pro tanto*. *In toto* equality means that the whole of the one prestation-object is equal to the whole of the other; for example, one sum of x is equal *in toto* to another sum of x . *Pro tanto* equality means that some element in the one prestation-object is equal to the whole of, or to some element in, the other. For example, consider two prestation-objects, xv and x ; the prestation-object xv may be analysed into $x+v$, the element x being equal to the other prestation-object x . Again, consider a "compound" prestation-object *decem et Stichus*, and a "simple" prestation-object *decem*; quoad x there is equality. The case of two compound prestation-objects *decem et Stichus*, *decem et Pamphilus*, is similar. A more difficult case is where one of the prestation-objects is "compound in the alternative," *e.g.*, *decem aut Stichus*, and the other contains one of the same alternative elements either alone, *e.g.*, *decem*, or in combination with some other element, *e.g.*, *decem et (aut) Pamphilus*. This case will meet us in connection with D. (45. 2) 15.¹

¹ *Infra*, p. 161 ff.

Combining the ideas of subjective alternativity and substantial objective equality, we arrive at the ordinary conception of solidarity in the general sense. To take an example of passive solidarity with generic prestation-object, suppose that T. is entitled to claim x from M. *or* to claim x from S. Here T. has the right of "electing" whether he will claim the full x from M. or from S., and is not obliged to split up his claim between them; but he cannot exact more than a single sum of x . Again, to take an example of active solidarity with specific prestation-object, suppose that M. is entitled to claim Stichus from T., *or* S. is entitled to claim the same Stichus from T. Here M. and S. have each a right of "occupation," that is, either can claim the entire property in Stichus (and not merely a pro indiviso share thereof), and the first who does so effectually, excludes the other, for not more than a single prestation of Stichus or his value can be exacted from T.

It will be observed that the objective equality necessary to the existence of solidarity has been qualified merely as substantial, not absolute. The significance of this qualification¹ is that we do not require full equality of prestation-content between the two obligations. Thus, suppose T. were entitled to claim x from M. at Rome or x from S. at Capua, the existence of a solidary relation will hardly be denied, in spite of the modal discrepancy; likewise if M. and S. were each subject to a different measure of "secondary" liability in the event of the prestation not being duly rendered. It may further be observed that solidarity is quite independent of any difference as regard modalities of condition and term, these

¹ Apart from the possibility of the equality of prestation-object being merely *pro tanto* and not *in toto*; see next page.

latter belonging to the obligation-content, not to the prestation-content.

Now the present treatise will, I think, render it plain that the civil law, by reason of its formalistic nature and its subjection to processual ideas, could reach the conception of solidarity as above explained in one way only, namely, through the construction, not merely of an objective *equality*, but of an objective *identity*, between two or more obligations, in order that process-consumption might operate extensively. On the basis of such constructive identity the civil law institute of joint obligation in solidum which we call correality was established, and to its establishment there were two conditions precedent: (i) absolute and not merely substantial objective equality; two prestations cannot be identified as one and the same unless they are precisely equal; as regards prestation-object the equality must here be *in toto*¹; and (ii) a single dispositive fact or cause from which both obligations originate and which serves to achieve the identification of the two prestations. Unless these two conditions were fulfilled, there could be no correality between two (or more) principal obligations.²

If, however, these two conditions were fulfilled, two (or more) obligations were produced with a constructive identity of prestation (*idem debitum*); by construction of law the two obligations were deemed to make up a single correal obligation (*eadem obligatio, eadem res*) which had a juristic individuality of its own. On the other hand it cannot be too strongly emphasised that this unity of obligation is a pure piece of legal construction adopted for a certain

¹ Cp. *infra*, pp. 93, 151 f.

² As to "accessory correality," *vide infra*, p. 71.

definite end, to wit, in order that process-consumption may operate extensively. Apart from this end each obligation maintains its own individuality, which fact appears prominently when the question of *confusio* arises.¹ It is therefore immaterial whether we speak of a single correal obligation or of two (or more) obligations correally related; sometimes it is more appropriate to use the one, sometimes to use the other, of these expressions.

It is an undoubted fact that the civil law institute of correalty was evolved within the sphere of the formal negotium of stipulatio. Here a correal relation could be produced only by means of a special stipulatory form which we call the "correal stipulation." The correal stipulation was governed by stringent rules which excluded any other result than the production of two objectively equal and identified co-existing obligations.² Any "inequality" or "non-identification" appearing formally in the terms of this stipulation rendered the whole act "inutilis," and under the old civil law the same result must, I believe, have occurred where the stipulation was formally unimpeachable, but there existed some element in the situation which caused a material "inequality" or "non-identification."³

At a certain period, probably in the early days of the Empire, jurisprudence extended the institute of solidarity to the real and consensual contracts of the *ius gentium*, which had now become an integral

¹ Cp. *infra*, p. 134 f.

² We omit reference to the case where a correal stipulation, incapable of fulfilling its proper end, was held to produce a valid "simplex" obligation, *vide infra*, p. 29, n. 2; by "simplex" obligation as opposed to "correal" obligation we mean an obligatory relation with only a single party on each side; "simplex" stipulation has a similar meaning.

³ *Vide infra*, p. 107 f.

part of the Roman legal system. But in this extension of the institute to the sphere of formless negotia, the following change would seem to be inevitable: Though a joint real or consensual contract contain some element which excludes the absolute equality or the identification necessary to the establishment of correality, it would be quite anomalous to hold the contract "inutilis" on that account alone; hence, I conjecture, jurisprudence was driven to invent a species of non-correal or simple solidarity which did not depend on the idea of objective unity of obligation, and in which, therefore, *litiscontestatio* had not, though *solutio* had, an extensive consuming effect. I further conjecture that this new institute of simple solidarity subsequently gained a footing within the realm of solidarity *ex stipulatu* to the extent that, where correality was excluded through a purely material "inequality" or "non-identification," a correal stipulation was no longer held "inutilis" on that account, but was allowed to produce a simple solidary relation.¹

Such, then, in outline, is the correality-solidarity theory which I propose and shall seek to establish by a critical examination of a considerable number of passages. A supplementary point must be mentioned. We may with confidence assert that anything in the nature of solidarity without unity of originating cause was abhorrent to the civil law. This principle was fully maintained within the realm of the formless negotia also, so that, as I believe, not even in the latest days of the classical jurisprudence could a legal solidary relation ever be constituted between two obligations where such unity was lacking. On the other hand, we have

¹ *Vide infra*, pp. 147 f., 246 ff.

clear evidence that two obligations, originating from different causes, and hence cumulatively related at law, might in equity be related solidarily. Accordingly we must admit the existence of an institute of equitable solidarity, and investigate the principles by which it was governed (§ 25).

In conclusion of this section we must draw attention to certain facts connected with the division of solidarity into active and passive.¹ Passive solidarity is a conception which presents itself so naturally that every legal system worthy of the name must afford some form of recognition thereto. Active solidarity, on the other hand, is a purely artificial conception which might, unless under exceptional circumstances, be dispensed with altogether. The difference is, that in passive solidarity we have only one creditor with one economic interest to be satisfied, and it matters nothing from what source satisfaction proceeds; whereas in active solidarity we have a plurality of creditors, each with a separate interest to be satisfied, and these interests have to be identified artificially as one and the same by act either of the parties or of the law itself. Active solidarity presents itself outwardly as a race for "occupation"; the creditor who wins carries off the whole prize and the rest get nothing.

Under these circumstances there can be little doubt that in Roman law passive correality was decidedly older than active correality; in fact, as we shall see, even in the mature classical period² the

¹ It is, of course, possible for a solidary relation to be both active and passive, that is, to have a plurality of parties on each side, but we may omit all reference to this complicated case.

² By the "mature classical period" we mean roughly the period from Julian (born *cir.* 100 A.D.) till the middle of the third century, the period from the accession of Septimius Severus (193 A.D.) till the same date

principles of active correality seem still to have been involved in some doubt.¹ We may, however, assume that, as far as possible, the incidents of the active correal relation were so worked out as to run parallel with those of the passive relation. Moreover, the case of the active correal stipulation affords some notable examples of the exclusion of correality and the introduction of simple solidarity on the ground of material "inequality" and "non-identification."²

§ 3. Scope and Disposition of the Present Work.

A few words must be added as to the scope and disposition of the present work. No attempt is here made to cover the subject of solidarity in all its manifold bearings. We merely seek to discover the essential principles underlying solidarity *ex contractu* in the classical and Justinianian legal systems respectively. In future studies we hope to apply the results here attained in a variety of directions. Certain of the limitations which we have imposed on this work call, however, for some remark.

In the first place it will be observed that the relation of principal and accessory debtor (or creditor) is excluded from consideration. This relation we call "accessoriality," and to its study a special monograph is being dedicated and will appear shortly. Accessoriality, like correality, is based on the con-

(approximately "the age of the Severi") being commonly referred to as the "late classical period"; the second half of third century, prolonged till the abdication of Diocletian (305 A.D.), we may describe as the "aftermath of the classical period." The period from Labeo to Julian we call the "middle classical period," and the last century or somewhat less of the Republic we call the "early classical period." Of course, the attempt to assign the introduction or evolution of particular institutes or doctrines to one or other of these periods can hardly ever yield more than approximate results.

¹ *Vide infra*, pp. 111, 128, 130.

² *Vide infra*, p. 107 f.

ception of unity of obligation, but, unlike correality, it does not place the different debtors or creditors on a co-ordinate footing. The conception of a formally accessory relation was only developed gradually in Roman law. Originally, it would appear, two parties whose material relation was that of principal debtor and sponsor (or fidepromissor) must bind themselves as co-principal debtors; it may be, indeed, that the earliest species of correal obligation had as its passive subjects parties whose material relation was as just described. The whole history of Roman suretyship proper¹ was a striving towards the idea of formal accessoryity, and it is here that the introduction of the institute of fideiussio, about the last days of the Republic or the commencement of the Empire, finds its rational explanation. Likewise in the active case, we believe, a principal creditor and adstipulator had at first to be formally constituted correal creditors, though latterly their relation assumed a formally accessory complexion.

An important distinction between correality and accessoryity is that, while the former relation depends essentially on unity of originating cause, the latter relation is antagonistic to such unity. Thus, there can be little doubt that the proper form for taking a principal debtor and fideiussor bound was by means of separate stipulations; the employment of a joint stipulation for this purpose, though it seems to have been tolerated by the mature classical jurisprudence, can hardly be described as other than anomalous.

In the second place we have omitted all reference to these complicated questions which arise from the nature of the prestation-object as imperfectly divisible

¹ *I.e.*, excluding *mandatum pecuniae credendae*, *constitutum alienae pecuniae debitae*, and *receptum argentariorum*.

or indivisible. The divisibility and indivisibility here referred to are essentially juristic, and may not be natural; thus slave Stichus is divisible juristically inasmuch as he may be owned in pro indiviso shares, though naturally he could not be divided without destroying his existence as a living slave. An obligation to give a determinate slave, like an obligation to give a sum of money, is perfectly divisible; an obligation to give, *e.g.*, a slave generally, is imperfectly divisible; cp. Paul. D. (45. 1) 2. 1; Julian. D. (46. 3) 34. 1. The standing example of an indivisible prestation-object is a praedial servitude.

In the third place we have omitted all reference to the case where a creditor or debtor dies leaving co-heirs, the complications which this case involves being largely bound up with those just indicated.

In the fourth place we have, as far as possible, eliminated all discussion of the "inner" relations between co-creditors and co-debtors, and of the rights of regress which these inner relations afford. Solidarity is *per se* quite independent of any question of inner relation between the different parties on the one side or the other.

By means of these limitations we have endeavoured to keep the present monograph within reasonable bounds, and to avoid digressions from the main problem set before us.

The correality-solidarity theory which we here submit to the judgment of the learned public is in certain respects quite new, and some of the positions taken up by us depend on a mode of textual criticism which is about as daring as anything yet attempted in this line. I am only too sensible to what an extent I lay myself open to the charge "of presumptuously pretending to re-make the ancient

texts, and of vainly exercising an arbitrary prerogative to the destruction of all truth.”¹ Yet, without a certain boldness of conjecture, it seems impossible to reach any solution of the problems here presented.

The disposition of the sequel is as follows: In Chapter II (§§ 4-20) we shall discuss the classical correality *ex stipulatu* in all its various bearings, and seek to discover the essential principles governing the civil law institute. A brief appendix (§ 21) on correality from *nexum*, *litteral contract* and *testament*, is added. In Chapter III (§§ 22-27) we shall discuss the classical simple and equitable solidarity *ex stipulatu*, and in this connection we shall take the opportunity of demonstrating the antagonism of civil law principles to anything in the nature of solidarity without unity of originating cause. In Chapter IV (§§ 28-32) we shall discuss solidarity *ex stipulatu* in the Justinianian law, observing the immense contrast which the latter here presents to the classical system.

Finally, in Chapter V (§§ 33-37), we shall discuss solidarity from real and consensual contracts, and shall find in this connection certain authorities which shed a most important light on our subject in general. In this chapter the classical and Justinianian systems can, without fear of confusion, be considered side by side.

¹ See Riccobono, ZSS., 35, p. 242.

CHAPTER II

CORREALITY EX STIPULATU UNDER THE CLASSICAL LAW

§ 4. Outline of the Subject

IT is universally admitted that the civil law institute of correality was developed within the sphere of obligations ex stipulatu, and our main interest is therefore fixed on that special stipulatory form which the Compilers of the *Institutes* (III. 16¹) have fortunately handed down to us and which we call the correal stipulation.

The origin of the stipulatio is still involved in darkness; the latest researches on this subject may be said to centre round Mitteis's well-known hypothesis² that stipulation, as we know it, had been evolved from the processual suretyship of the praedes and vades. The origin of the correal stipulation shares in the general obscurity, but Mitteis's hypothesis suggests some interesting speculations. Is it not possible that the earliest correal stipulation was between a creditor on the one side and a principal debtor and a sponsor on the other?

We cannot in this place undertake any investigations of an antiquarian nature, but must accept the existence of the correal stipulation as an accomplished fact. What we do enquire is, Why was this

¹ *Infra*, pp. 65 ff., 124 ff.

² *Über die Herkunft der Stipulation: eine Hypothese*, in *Aus. röm. u. bürgerl. Recht* (Festschrift f. Bekker, 1907), p. 107 ff.

particular form as described in the *Institutes* chosen? why these separate questions, and, in the passive case, separate answers? why this intermingling of questions and answers, so that, until the interrogatory is complete, no response is given? why the inflexion of *idem* ("*eosdem*") in the second question of the interrogatory? The solution of these problems is to be found negatively in the results which the correal stipulation was designed to exclude, and positively in the result which it was designed to produce.

The results which the correal stipulation was intended to exclude are three in number: partition, novation, and cumulation; their exclusion forms the subject of §§ 5-11.

The result which the correal stipulation was intended to produce was the simultaneous creation of two or more co-ordinate principal obligations with different subjects on the one side or the other, but with an identity of object (*idem debitum*), in respect whereof they were regarded as one and the same obligation (*eadem obligatio; eadem res*). In §§ 12-13 we shall discuss this unity of obligation and a special element therein, namely, "extensive responsibility."

Thereafter we shall take a comprehensive survey of the requisites of the correal stipulation (§§ 14-17), and then consider the vital question of "*eadem res* and civil consumption" (§§ 18-19).

Finally, we shall consider the subject of "actions on a correal obligation" (§ 20), and by way of an appendix mention "correality from *nexum*, *litteral contract* and *testament*" (§ 21).

This course of investigation will, it is hoped, place in a clear light the institute of correality *ex stipulatu* which had its roots deep in the civil law. The all-

important point is the necessity of a joint stipulatory act (so framed as to exclude partition), in order that a civil law principal correal relation may be produced. Destroy the unity of originating cause and you inevitably have two formally distinct obligations, in which case one or other of three results must take place: (i) the later obligation novates the earlier, or (ii) both obligations co-exist cumulatively so that neither *litiscontestatio*, *solutio*, nor any other fact bearing on the one alone can at law¹ prejudice the subsistence of the other, or (iii) the later obligation is invalid. Maintain the unity of originating cause, and under the strict civil law the only possible alternatives (partition being excluded) are (i) constructive unity of obligation, *i.e.*, correality, and (ii), where such unity is excluded on formal or material grounds, total invalidity of the act.² The other alternative, namely, simple solidarity, represents, we believe, a derogation from strict civil law principles on the part of the mature classical jurisprudence.

§ 5. Solidarity (Correality) *versus* Partition.

The question of partition introduces to us, for the first time, the theory of joint contract. By a joint contract we do not mean simply that a number of agreements have for the sake of convenience been concluded more or less simultaneously. What we do mean is that several parties have together made or received promises which purport to cover one and the same prestation.

Now when all the requisites of a joint contract

¹ Equity may reduce this cumulation to solidarity; see our subsequent exposition of "equitable solidarity," p. 192 ff.

² We leave out of account meanwhile the possibility of a joint stipulation being valid to produce a simplex obligation but *quoad ultra* invalid (partial invalidity); *vide infra*, pp. 88, 96, 106.

are fulfilled, one possible result is "partition" of the prestation promised. This means that each of the various debtors becomes bound to render, each of the various creditors becomes entitled to claim, a separate pro rata share of the prestation and that alone, as sole debtor or creditor. Whether the basis of division be equality or some other proportion does not here concern us, and we ignore the complications which arise where the prestation-object is only imperfectly divisible or not divisible at all.¹ Obviously, partition and correality are directly opposite results²; the former must be excluded if the latter is to be produced. Partition implies the creation of a number of independent and cumulative obligations; each of these latter has an object peculiar to itself alone, and no fact bearing on one only can prejudice in any way the subsistence of the others.

There is, however, another aspect of the antithesis solidarity *v.* partition which has to be attended to. In order that partition may take effect, there must be a single whole prestation to be divided, and this whole prestation forms the object of an ideal correal obligation. If, then, in any concrete case we find a decision in favour of partition or a discussion as to its possibility, by simply excluding this result we at once arrive at correality. The very suggestion of partition shows that one and the same prestation is due by, or to, all the various subjects together, and if we hold each bound, or entitled, in solidum instead of pro rata, we have that identity of obligation-object on which the institute of correality is based.³

¹ *Vide supra*, p. 24 f.

² Cp. Diocletian. C. (8. 39 (40)) 2 (3).

³ Cp. Levy, *Konk.*, p. 178 f. These statements require a slight qualification in the case where a prestation is "individualised" by the person of the creditor or debtor; here the exclusion of partition can

We have already had occasion to observe¹ that passive solidarity is a perfectly natural juridical phenomenon, while active solidarity is something quite artificial. An important illustration of this principle is afforded by the fact that a passive joint contract naturally produces solidarity, while an active joint contract naturally produces partition. Where we have a plurality of debtors in a joint contract, the creditor has one economic interest to be satisfied, and he is entitled to look to all the debtors collectively and to each one individually for satisfaction of this interest in its entirety. Where, on the other hand, we have a plurality of creditors in a joint contract, each of them has a separate interest demanding satisfaction, and partition is the natural means of effecting a compromise among these conflicting interests: "*fiunt concursu partes.*" These statements require detailed consideration as regards (a) the active joint contract, and (b) the passive joint contract.

(a) Suppose Maevius and Seius on the one side, and Titius on the other, make a contract, by virtue of which T. owes M. and S. a sum of money, but in which nothing is said as to whether the latter are entitled *singuli in solidum* or *pro rata*. Here, if we were asked what is the natural effect of the contract, we should probably reply that T. is bound to pay the total sum to M. and S. together, that is to say, he must by some means or other place the entire amount under the common control of both M. and S.,² who only lead to simple solidarity; *vide infra*, p. 150 f. In any event, however, partition is impossible without unity of originating cause; *vide infra*, p. 154, n. 2.

¹ *Supra*, p. 22.

² *E.g.*, by placing a bag of coin in the physical control of both M. and S.; by payment to their common agent; by making payment to one, say M., on behalf of both, M. having an express or implied mandate to act for S. in the matter.

can then divide it between them according to their respective interests. If T. pays the total sum to one of them, say M., on his (M.'s) account alone, he is not thereby freed from S.; for by the terms of the contract he was bound to M. and S. together, not to M. solely. S. can therefore still claim his own proportionate share of the debt from T., and T. can claim from M. a refund of the amount overpaid.

Again, if judicial proceedings become necessary we should naturally say that M. and S. ought to institute a single joint action, obtain a single joint judgment, and carry through a single joint execution for the full sum. But suppose joint proceedings are out of the question, for example, one of the creditors is absent or refuses to concur in the institution or maintenance of the action; here our natural sense supports the view that the other creditor should be allowed to take separate action for the recovery of his proportionate share of the debt.

All this amounts to saying that the right arising from an active "simple"¹ joint contract is naturally partitioned, and if it is desired to render the co-creditors entitled correally, the contract must be specially framed so as to achieve this result.

(b) On the other hand, if under a joint contract M. and S. owe T. a sum of money, but they are not expressly bound *singuli in solidum* or *pro rata*, our impressions as to the natural result are quite different from those just stated. There is certainly no necessity for M. and S. to join in making payment of the amount due, for T.'s interest is equally satisfied from whatever source the payment comes—whether from

¹ "Simple" here="not containing any express statement either that the creditors are entitled *singuli in solidum* or that they are entitled *pro rata*."

M. and S. jointly, or from one of them alone, or from a third party intervening on behalf of both or of either. Again, if judicial proceedings become necessary, we might be tempted to say that if possible T. ought to sue M. and S. together in a single joint action. But this carries us little way, for we immediately ask, Will such an action lead to a single condemnation in *solidum* against M. and S. jointly, *or* to separate condemnations against each *pro rata*, *or* to separate condemnations against each in *solidum* so related that recovery under the one extinguishes the other? Again, if a single joint condemnation in *solidum* is pronounced, can the same be executed against either in *solidum* or must it be executed against each *pro rata*? Moreover, if a joint action against both is out of the question, say one of them is absent or is so hopelessly insolvent that it would be plainly useless to sue him, we feel bound to hold that the other may be sued alone. But this again carries us but little way, for we immediately ask, Can this action be in *solidum* or must it be *pro rata* merely?

In order, then, to arrive at the natural effect of a passive simple joint contract, we must approach the subject from another side. M. and S. have promised to satisfy a certain interest pertaining to T., and they have promised to satisfy this interest in its entirety. If M. and S. are both present and both are solvent, it may be thought more equitable that T.'s claim should be directed against them *pro rata*. But if one of them, say M., be absent or insolvent, on what principle can the other, S., refuse to pay more than a proportionate share of the debt, and thus seek to transfer to T.'s shoulders the loss arising from M.'s default? S. has himself undertaken to satisfy T.'s interest in its entirety; and though he has

assumed this liability in conjunction with M., so that under normal circumstances the burden may in equity be divided between them, yet if M. makes default, T., we believe, must on a natural construction of the contract bear the entire burden himself. That is to say, a passive joint contract naturally leads to solidarity, and if partition is intended this result must specially be provided for by the terms of the agreement.

The foregoing remarks are of a perfectly general nature, and, as we shall presently see, technical considerations may militate against their application in the case of formal negotia. Nevertheless this divergence in natural tendency between the two classes of joint contract is a fact of first-rate importance and constantly asserts itself when not counteracted by other forces.

A further point is to be noted. In the case of passive joint contracts we have suggested the equity of granting the co-debtors a *beneficium divisionis* where both are present and solvent. As might be expected, however, the civil law admitted no such equitable device; if solidarity be established its effects must be carried out consistently, so that the creditor is entitled to exact the full prestation from either debtor under all circumstances. True, this rule was altered by statute in the case of co-accessory debtors,¹ but it remained intact right through the classical period in the case of co-principal debtors,²

¹ Sponsores and fidepromissores taken bound in Italy were accorded an "eventual partition" by the *lex Furia*, and fideiussores a *beneficium divisionis* under Hadrian's rescript (*Gai.* III. 121 ff.). Jurisprudence extended the *beneficium divisionis* to certain parties who, though formally principal debtors, were from the material standpoint liable on behalf of another, *e.g.*, joint *mandatores pecuniae credendae* (*infra*, p. 322 f.) and magistrates liable on the ground of failure to exact sufficient security from tutors (Levy, *Konk.*, p. 304 ff.).

² Whose liability was principal materially as well as formally; see previous note.

and all indications to the contrary in the Digest must be attributed to the Compilers.¹

A creditor was, however, at perfect liberty to split up his claim among his correal debtors if he so chose; this right is everywhere taken for granted and no proof thereof need be adduced. The sole point that calls for remark is Levy's² suggestion that only by aid of the maxims "tot esse stipulationes quot summae sunt, totque esse stipulationes quot species sunt," was a creditor able to sue for part of a sum of money (or for part of a quantity of other fungibles or for a pro indiviso share of a determinate species) due to him under a single stipulation. Applying this doctrine to the case of a correal stipulation, we have the result that if T. stipulates for x from M. and S. correally, and he sues M. for vi and S. for iv, the original correal stipulation must, in order to render such separate pro rata actions possible, be deemed to consist of two separate stipulations, one for vi from M. and another for iv from S.

Though obviously it would be out of the question to argue the point at length here, I venture to express the strongest doubts as to the soundness of Levy's views on this matter. Any obligation *dari* having as its prestation-object *certa pecunia* or *certa res* is by its nature capable of being divided "vertically"³ into any number of lesser obligations at the pleasure of the creditor, without any necessity of the originating cause of obligation being deemed so divided. And so if T., having an obligatory right

¹ As to the beneficium divisionis between co-principal debtors, see Levy, ZSS., 37, p. 26, n. 2; cp. *Infra*, p. 240.

² *Konk.*, p. 118.

³ This expression is used by Levy, *Konk.*, p. 82, n. 8 to p. 81

to x against M., brought an *actio certae creditae pecuniae* thus: “*si paret Maevium Titio sex dare oportere*,” could any one suggest that such action was not competent or that it consumed T.’s right to the whole x? Assuredly not; T. having a right to x is by the nature of things entitled to sue M. for vi meanwhile, his claim for the remaining iv being preserved intact. Hence it seems altogether superfluous to invoke the maxims cited.

§ 6. Joint Stipulations, Simple and Correal.

In the case of formless *negotia* the condition precedent to the establishment of a joint contract is purely material, namely, that all the various parties shall have acted with a common intention in the matter.¹ But when we come to a strictly formal *negotium* like stipulation, obviously a common intention is not enough; a form must be employed which will outwardly mark the act as consisting not of two or more separate stipulations but of a single joint one.

Now the simplest form of joint stipulatory act is no doubt as follows:—

Form A.

Passive—*Titius*: *Maevi, Sei, decem dari spondetis?*²

Maevius et Seius (simul): *spondemus.*

Active—*Maevius et Seius (simul)*: *Titi, decem dari spondes?*²

Titius: *spondeo.*

And in point of fact it has been conjectured that

¹ *Vide infra*, p. 241.

² It is quite immaterial whether we use the active or the passive infinitive (*dare* or *dari*), and whether or not we add *-ne* to the principal verb (*spondetis*, *spondes*); a dative (*mihi*, *nobis*) is of course implied.

such was the original form of joint stipulation.¹ No reliance can, however, be placed on this conjecture, for, as we know, simplicity is by no means a necessary characteristic of primitive legal forms. But, furthermore, it seems clear that this form was productive, not of solidarity, but of partition.

The leading authority on this point is D. (45. 2) 11. 1, 2. Papinian. XI. respons.

§ 1. Cum tabulis esset comprehensum "illum et illum centum aureos² stipulatos," neque adiectum "ita ut duo rei stipulandi essent," virilem partem singuli stipulati videbantur.

§ 2. Et e contrario cum ita cautum inveniretur: "tot aureos² recte dari stipulatus est Iulius Carpus, spondimus ego Antoninus Achilleus et Cornelius Dius," partes viriles deberi, quia non fuerat adiectum singulos in solidum spondisse, ita ut duo rei promittendi fierent.

It seems impossible to doubt that these two responsa are substantially³ genuine and give a true representation of the law as actually existing in Papinian's day. I cannot by any means concur in

¹ See, e.g., Merkel, *Der römisch.-rechtl. Begriff d. Novatio* (1892), p. 15; cp. Levy, *Sponsio*, p. 39, n. 2.

² Papinian presumably wrote "sestercia."

³ We have, of course, no guarantee that § 2 immediately followed § 1 in Papinian's *Responsa*, and the Compilers may have made some formal adjustments of the text. As the §§ stand, apparently "videbantur" in § 1 must serve as the principal verb of § 2 likewise, so that in the first case it has a personal subject "singuli," and in the second an impersonal subject "partes viriles," but such an inelegance is hardly to be expected of Papinian; we also note the use of the singular "virilem partem" in § 1 and the plural "partes viriles" in § 2. It seems more probable therefore that § 2 did not immediately follow § 1 in Papinian's *Responsa*, and that "partes viriles deberi" was originally governed by a "respondi."

Levy's objection¹ that the word "videbantur" suggests "a view lying the past and moreover clearly betrays some uncertainty." We must remember that under the classical law a *cautio stipulatoria* served merely to prove a contract clothed in the solemn oral form of question and answer; the formal constitutive cause of obligation lay solely in the *verba* used on the occasion of the oral solemnity.² Papinian is here asked for opinions on two *cautiones* which state respectively that two parties stipulated jointly and two parties promised jointly, but which do not contain any words implying the constitution of a correal relation. His answers are to the effect that *cautiones* so framed can only be regarded as evidence of verbal contracts in which *pro rata* shares have been stipulated for or promised. By means of the words "stipulati videbantur," Papinian reports, in somewhat grecized form perhaps (? = ἐπερωτήσαντες ἐφαίνοντο), the long established rule as to the evidential effect of the words of the first document.

But what is the inference with regard to the form of the oral stipulation? Plainly this, that if the framework of a stipulation is simply joint and no more, the result will be partition; if correality is intended, it must be expressly provided for. But the clearest example of a stipulation simply joint and no more would seem to be Form A above; hence we conclude that this form produces partition.³

¹ *Konk.*, p. 180.

² See Riccobono, ZSS., 35, p. 243 ff.

³ The Proculian view that a stipulation *sibi et alii dari* renders the stipulator entitled merely *pro rata* (*Gai.* III. 103), corresponds exactly with the rule that a simple joint stipulation produces partition (cp. Mitteis, ZSS., 32, p. 22). It seems highly probable that the late classical jurists generally adopted the Proculian view, otherwise Justinian (*Inst.* III. 19. 4) would hardly have given it the preference over the more common-sense and equitable view of the Sabinian school who held the stipulator entitled to the whole; see further, *infra*, p. 68 ff.

How, then, is correality to be expressly provided for in a stipulatory formula? We have no difficulty in suggesting an answer to this question. The interrogatory must be framed "distributively," that is to say, each of the several debtors must be asked whether he will render the whole prestation to the common creditor—each of the several creditors must ask the common debtor whether he (the debtor) will render the whole prestation to him (the particular creditor).

Now, doubtless, an interrogatory consisting of a single question may be distributively framed thus:—

Form B.

Passive—*Titius*: Maevi, Sei, uterque vestrum decem dari spondet? *or* singuli decem dari spondetis? *or* the like.

Active—*Maevius et Seius (simul)*: Titi, utrique nostrum decem dari spondes? *or* nobis singulis decem dari spondes? *or* the like.

But this form of distributive interrogatory, though its efficacy cannot be denied, was not that commonly employed, so far as our evidence goes. The form actually used in practice consisted of two questions put to, or by, each of the two debtors or creditors individually, the second question being connected with the first by means of some inflexion of *idem* or *is*,¹

¹ *Idem* and *is* I consider to have precisely the same effect here (cp. Levy, *Sponsio*, p. 19 ff.), but I do not believe that their insertion had any immediate connection with the exclusion of partition, as is commonly supposed (see, e.g., H. Krüger, ZSS., 22, p. 216 f.). The precise function of *idem* (*is*) and the effect of its omission will be considered when we come to deal with cumulation; *infra*, p. 60 ff. The distinction between *idem*=*is* (the same as something already mentioned) and *idem*=*unus* (one and the same) should be noted.

so that both were shown to be parts of one and the same interrogatory ; thus :—

Form C.

Passive—Titius : Maevi, decem dari spondes ?

Sei, eadem decem (ea decem, idem,
id) dari spondes ?

Active—Maevius : Titi, decem dari spondes ?

Seius : Titi, eadem decem (ea decem, idem,
id) dari spondes ?

This form of distributive interrogatory with double questions was greatly to be preferred to the previous one (Form B) on the ground of distinctness, and for this reason I venture to regard it as the original and orthodox formula of the civil law, any other formula being admitted merely through tolerance of the classical jurisprudence.

As regards the framework of the response, the essential point is that “acquiescence” in the terms of the interrogatory must be clearly expressed. The interrogatory being distributively framed, it would appear that a simple non-distributive response :—

Form D.

Passive—Maevius et Seius (simul) : spondemus.

Active—Titius : spondeo,

is sufficient. But this form, it seems clear, was not that commonly employed. In the passive case two separate answers were in practice given, which answers apparently need not be connected by an inflexion of *idem* or *is*, their relation to the same interrogatory being a sufficient connection ; in the active case the common form appears to have been a single answer framed distributively ; thus :—

Form E.

Passive—*Maevius*: spondeo.

Seius: spondeo.

Active—*Titius*: utrique vestrum dare spondeo, *or*
vobis singulis dare spondeo; *or* the like.

Separate answers in the active case: “*Maevi*, spondeo—*Sei*, spondeo,” would, however, be quite unexceptionable. By any of these formulæ “acquiescence” in the distributive interrogatory is very clearly expressed.¹

Thus we arrive at the common form of correal stipulation substantially portrayed in *Inst.* III. 16 pr.²:—

Form F.

Passive—*Titius*: *Maevi*, decem dare spondes?

Sei, eadem decem dare spondes?

Maevius: spondeo.

Seius: spondeo.

Active—*Maevius*: *Titi*, decem dare spondes?

Seius: *Titi*, eadem decem dare spondes?

Titius: utrique vestrum dare spondeo.

If our speculations be sound, we have accordingly two distinct forms of joint stipulation:—

(i) The simple joint form (Form A) with non-distributive interrogatory, which produces partition; and (ii) the correal joint form (Forms B to F) with

¹ If the interrogatory be non-distributively framed, the fact of the response being distributively framed cannot, it is thought, render the stipulation as a whole distributive, so as to give it correal effect, for the purpose of the response is merely to express acquiescence in the interrogatory; indeed, a distributive response given to a non-distributive interrogatory might render the whole act null and void on the ground of “non-acquiescence”; cp. *infra*, p. 89 f.

² *Vide infra*, p. 65.

distributive interrogatory, which produces solidarity and which we call the "correal stipulation."

It will be observed that in the foregoing exposition partition appears as the normal result of a passive, as well as of an active, joint stipulation; in both cases alike solidarity is an abnormal result which calls for the use of a special distributive formula. But we have already seen that a passive joint contract naturally leads to solidarity; wherefore, then, this artificial departure from the natural trend of juridical doctrine? The only possible explanation seems to be that the rule in favour of partition formed part of the old civil law tradition, being established long before the days of mature juristic reflection. The co-debtors have bound themselves collectively to render a certain prestation; hence, it was naïvely concluded, individually each can owe only a part of this prestation.¹

Be this as it may, the position seems clear that as regards the antithesis solidarity *v.* partition the active and the passive joint stipulations were governed by precisely the same rules. Yet signs are not wanting that even here the divergency in natural tendency sometimes made itself felt; an excellent example is found in the *cautio damni infecti*.² It is, however, only when we get into the realm of formless *negotia* that we can represent the natural

¹ Another explanation which may suggest itself to some is not, in my opinion, tenable, namely, that the passive joint stipulation simply framed was held to produce partition by way of analogy to the active joint stipulation where the natural result was partition. The passive joint stipulation must, I believe, be decidedly more ancient than the active (*vide supra*, p. 22 f.), so that any argument from the latter to the former is excluded.

² Levy, *Konk.*, p. 180 f. I cannot here enter into a discussion of this case. The reader is referred to Lenel, *Edict.*, p. 527 (where the formula of the *cautio* is given); Paul, D. (39. 2) 27; (11. 1) 20. 2.

tendencies of active and passive joint contracts as operating without formal restraint.¹

Finally we have to note that in practice it is hardly conceivable that parties would employ a joint form of stipulation, active or passive, unless they intended to produce solidarity; if they intended to produce partition their obvious course was to enter into separate stipulations. Thus the whole doctrine that a simple joint stipulation leads to partition comes to be little more than a pitfall for the unwary. The case in which the antithesis solidarity *v.* partition assumes vital importance is where a creditor or debtor dies leaving co-heirs, but this case does not fall within the scope of our present enquiry.²

§ 7. Authorities (§§ 5 and 6).

(1) Papinian. D. (45. 2) 11. 1, 2 have already been considered.³

(2) *Inst.* III. 16 pr., 1 will be considered later.⁴

(3) D. (45. 3) 29. Paul. LXXII. ad edict.

Si communis servus sic stipulatus sit : “decem illi domino, eadem decem alteri dare spondes?” dicemus duos reos esse stipulandi.

Much of the Digest title *de stipulatione servorum* (45. 3) is concerned with the case of a stipulation by a servus communis, and the analogy of this case with that of an active joint stipulation is apparent. The general principle clearly was that if a common slave stipulated in non-distributive form on behalf of both masters, each of the latter acquired a pro rata right, though in certain cases a doubt existed as to

¹ *Vide infra*, p. 241 f.

² *Vide supra*, p. 25.

³ *Supra*, p. 37 f.

⁴ *Infra*, pp. 65 ff., 124 ff.

whether such right was *pro parte virili* or *pro parte dominica*.¹ On the other hand, as our present fragment shows, it was perfectly well recognised that a common slave might, by using a distributive simplex formula :—

decem Maevio, meo domino, eadem² decem Seio,
meo domino, dari spondes?

or the like, confer solidary rights on his masters.

But the distributive simplex formula just quoted clearly corresponds to the distributive joint formula :—

Maeuius : decem dari spondes?

Seius : eadem decem dari spondes?

Likewise the non-distributive simplex formula :—

Maevio et Seio, meis dominis, decem dari spondes?

or the like, which produces partition, clearly corresponds to the non-distributive joint formula :—

Maeuius et Seius (simul) : Titi, decem dari spondes?

A fresh piece of evidence is thus obtained that a simple joint stipulation produces partition, a special distributive form being required in order to produce solidarity.

(4) D. (45. 2) 8. Ulpian. I. respons.

His verbis : “*eaque praestari stipulanti tibi spopondimus*” [*interesse quid inter contrahentes actum sit : nam si duo rei facti sint,*] eum qui absens fuit non teneri, praesentem autem in solidum esse obligatum, [*aut si minus, in partem fore obstrictum*].

Here, as in Papinian. D. (45. 2) 11. 2,³ we have a *cautio stipulatoria* purporting to record a passive

¹ Cp. Ulpian. D. (45. 3) 7 pr. and Pomponius eod. 37.

² The omission of “*eadem*” would not, I believe, make any practical difference to the result ; *vide infra*, p. 60 f.

³ *Supra*, p. 37 f.

joint stipulation, but without any words indicating that the debtors were taken bound *singuli in solidum*. *Prima facie*, therefore, we must, applying Papinian's decision, treat the *cautio* as evidence of a joint stipulation in non-distributive form:—

Titius: Maevi, Sei, decem dari spondetis?

with partition as the result.

The case in our present fragment, however, presents a speciality of grave consequence. One of the two parties, M. and S., mentioned in the document as joint promisors, say M., is proved not to have been present when the contract was concluded, and hence he cannot have taken part in the oral solemnity. In other words, the *cautio stipulatoria* is proved to be false in a certain respect. No joint stipulation between T. on the one side and M. and S. on the other can have taken place, and the document must be construed as attesting merely a *simplex stipulation* by T. from S., who admittedly was present. But clearly, under the classical law, M., having taken no part in the verbal stipulation, is not bound at all, for the originating cause of obligation is the oral solemnity and that alone. The question then arises, Is S. bound in *solidum* or *pro rata*?

Now consider how this question is solved in the fragment as it stands. We must, it is held, enquire what the parties really intended by the words quoted from the document. If it was intended to constitute M. and S. *correal debtors*, S. is liable in *solidum*; otherwise he is liable only *pro rata*. That such a decision never proceeded from the pen of Ulpian we may assert with the utmost confidence. Here the document is plainly assumed to have *per se* a dispositive value, and must be interpreted so as to

bring out the real intentions of parties. The *clausula stipulatoria* itself is indecisive on the question of solidarity or partition, and accordingly we have to construe it in the light of remaining contents of the document and any other relevant facts showing the parties' intentions in the matter. If it is thus ascertained that solidarity was intended, then obviously S. remains liable in *solidum*, though M. is detracted, and conversely if not solidarity but partition was intended, S. remains liable *pro rata* in the same event. All this, as we shall see later,¹ is perfectly good Justinianian law,² but it certainly is not classical.

Again the fragment bristles with formal defects: the phrase "*inter contrahentes*" is characteristically Tribonianian³; the construction "*his verbis . . . interesse quid . . . actum sit*," "*his verbis*" being governed by "*actum sit*," is clumsy; after "*nam*," *oratio recta*, not *obliqua*, is properly called for; the concluding passage "*aut si . . . obstrictum*" is inelegant in the extreme.

If, however, we delete the passages "*interesse . . . sint*" and "*aut . . . obstrictum*," we get what was almost certainly Ulpian's decision, namely, that M. is not bound but S. is liable in *solidum*. Though, assuming both M. and S. to have participated in the oral solemnity, the words of the document must be interpreted as evidence of a simple joint stipulation resulting in partition, yet when it is proved that actually the stipulation was between T. and S. alone, the whole prestation promised is due by the latter.

¹ *Infra*, p. 217 f.

² As existing when the Digest was compiled; Justinian, by Novel 99 of the year 539, altered the rule that the question of solidarity or partition must be determined solely in accordance with the parties' intentions; *vide infra*, p. 236 ff.

³ Cp. Beseler, II., p. 70 f.; III., p. 62.

As to the soundness of this decision, no one will, I venture to think, entertain any doubt.

(5) D. (45. 2) 4. Pomponius XXIV. ad Sabin.

< - >¹ [Duo rei] < ~ >² promittendi < - >³
sive ita < - >⁴ interrogati “ < - >⁵ spondetis?” respondeant < - >⁶ “spondeo” aut
< - >⁷ “spondemus,”⁸ sive ita < - >⁹ interrogati “spondes?” respondissent < - >¹⁰
“spondemus,” recte obligantur.

It seems impossible now to decide with any certainty wherein the original significance of this awkward fragment lay. If we delete with Mommsen and Lenel the words “aut ‘spondemus’” as a gloss, we seem to have a reference to the rule that the response must be “congruent” with the interrogatory—the rule of “congruence” is not broken where the debtors reply in the singular to a question put in the plural and vice versâ, provided always the same principal verb is used throughout.¹¹ Emendations of this sort are, however, quite arbitrary, and we are bound to ask ourselves whether no other interpretation is possible.

Taking the text of the fragment as it stands, we at once note the fact that three cases are mentioned: (i) where the creditor puts a single question in the plural (spondetis?) and the debtors give separate

¹ *Sabinus ait*

² *duos reos*

³ *ita interrogandos esse ut a singulis tota res stipulatori debeatur, sed parvi interesse utrum simul interrogentur vel respondeant an separatim. quamvis igitur ita separatim interrogati “spondes?” respondere separatim “spondeo” soleant, tamen*

⁴ *simul*

⁵ *singuli*

⁶ *separatim*

⁷ *simul*

⁸ “aut ‘spondemus’” del. Mommsen et Lenel (*Pal.*, II., col. 134).

⁹ *separatim*

¹⁰ *simul*

¹¹ *Vide infra*, p. 89.

answers¹ in the singular (spondeo); (ii) where the creditor puts a single question in the plural (spondetis?) and the debtors give a single answer in the plural (spondemus); (iii) where the creditor puts separate questions in the singular (spondes?) and the debtors give a single answer in the plural (spondemus). Nothing, however, is said of the fourth case where the creditor puts separate questions in the singular (spondes), and the debtors give separate answers in the singular (spondeo).

Is it not possible that here we have the clue to the original purport of the fragment? May not Pomponius have been dealing with the necessity of a distributive form in order to exclude partition? May not the substance of his argument have been that though the form with double question and double answer was the one regularly used, yet any of the other three forms referred to would suffice? If we adopt this suggestion we are bound to give the single question "spondetis?" a distributive force, which can easily be done by introducing "singuli."

In the notes I have ventured an altogether conjectural restoration based on the foregoing suggestion. The structure of the fragment as it stands cannot be described as particularly elegant, and I think it possible that Pomponius commenced with a quotation from Sabinus and then gave explanations of his own.

Assuming that Pomponius's argument was such as I have supposed, it is easy to understand why the Compilers mutilated the same. Under the Justinianian law, as existing at the time when the Digest was compiled,² the question whether a joint

¹ It is hardly likely that a single answer "spondeo" given by both speaking together is referred to.

² *Vide supra*, p. 46, n. 2.

stipulation produced solidarity or partition depended, not on any formal words used, but on the real intentions of parties.¹

(6) D. (45. 2) 2. Javolen. III. ex Plaut.

Cum duo eandem pecuniam [*aut promiserint aut*] [*stipulati*] < ~ >² sunt, ipso iure [*et*] singuli in solidum [*debentur*] < ~ >³ [*et singuli debent*]: ideoque petitione acceptilatione⁴ unius tota solvitur obligatio.

As this fragment stands it seems to contain a general statement that when two parties promise or stipulate for the same sum of money, they are ipso iure correal debtors or creditors; nothing is said as to the necessity of a joint stipulation distributively framed. The hand of the Compilers is, however, here evident.⁵ The final clause "ideoque . . . obligatio" makes it plain that Javolen only dealt with the active relation, and we must, therefore, delete all references to the passive relation. "Promiserint" (apparently the perfect subjunctive) standing side by side with "stipulati sunt" in the same clause, is another sign of interpolation; again, the expression, "singuli in solidum debentur" is clearly impossible.

But what may Javolen have written? I venture to think that he dealt with the case of two adstipulatores acceding to the same principal obligation. As we know, the Compilers frequently altered "adstipulari" to "stipulari."⁶ Further discussion of this fragment is accordingly reserved for my study on Accessoriality.

¹ See further, *infra*, p. 219.

² *adstipulati*.

³ *actionem habent*.

⁴ Mommsen: *acceptilatione*.

⁵ As to the significance of the fragment from the standpoint of the Justinianian law, *vide infra*, p. 219.

⁶ Heumann-Seckel, s. v. *stipulari*, p. 556.

§ 8. **Solidarity (Correality) versus Novation.**

The classical law of novation by stipulation (with change of subject) may be explained by the following illustration: An obligation has already been constituted between T. as creditor and M. as debtor for the sum of x, the manner of constitution being immaterial. T. now stipulates from a third party S., thus:—

Form G.

Titius: Sei, (eadem, ea)¹ decem quae Maevius mihi debet (sponndit, promisit, quae Maevium mihi dare oportet ex causa furti, etc.), dari spondes?

Seius: spondeo.

Or a third party S., with T.'s authority,² stipulates from M., thus:—

Form H.

Seius: Maevi, (eadem, ea) decem quae Titio debes (etc.) dari spondes?

Maevius: spondeo.

In the first case (Form G) M. is freed and S. steps into his place as sole debtor; this we call "passive novation." In the second place (Form H)

¹ These words have merely a demonstrative value and are not in any way necessary; the identifying factor is the clause "quae M. mihi debet." "(Idem, id) quod" may be substituted for "(eadem, ea) decem quae," but proof will then be required as to how much M. did actually owe T. As to the equivalence of *idem* and *is*, *vide supra*, p. 39, n. 1.

² This material condition is clearly essential because T. cannot be deprived of his right without his consent; if it is not fulfilled, the second stipulation will either be ineffective or will produce an obligation related cumulatively to the pre-existing obligation. The question which of these results takes place cannot be discussed here, but it will be observed that in Ulpian. D. (46. 2) 8. 5 (period a as restored, *infra*, p. 57) cumulation (duplari dotem) is mentioned as the alternative of novation.

T.'s right is extinguished and S. steps into his place as sole creditor ; this we call "active novation."

The formal requisites of novation therefore are (i) diversity of constitutive cause ; the obligation to be novated must be already existent and the novatory obligation must now be constituted by a fresh cause ; and (ii) identification of the object of the second obligation with that of the first ; properly speaking, this identification should be express (*quae Maevius mihi debet, quae Titio debes*), but under certain circumstances it will be implied by law.¹

If these requisites are fulfilled, novation takes place *ipso iure*, and the parties cannot, we believe, prevent this result by introducing into the stipulatory formula any modifications which the law itself does not recognise. Suppose, for example, T. were to stipulate thus : "*Sei, (eadem) decem quae Maevius mihi debet, tu quoque (or praeter Maevium) dari spondes?*", in our opinion this stipulation would be invalid.² The intentions of parties here are to add S. as a co-debtor with M., without freeing the latter, but any such intention is futile under the civil law, because of the legal rule that a promise by S. of "*idem quod M. debet*" novates the pre-existing obligation of M. The parties have introduced into a formula to which the law attributes novatory effect, words designed to prevent this effect, but the law frustrates such design by invalidating the whole transaction.³

Obviously the correal stipulation, being designed

¹ As to the case where the prestation object is specific, *vide infra*, p. 64.

² *Contra* (apparently) Levy, *Konk.*, p. 176, n. 5.

³ We cannot here attempt to prove the foregoing propositions, or to enquire how far, if at all, the mature classical jurisprudence admitted derogations from strict civil law principles. In my future treatise on Accessoriality I shall show cause for believing that the classical juris-

to create two co-existing obligations, stands directly opposed to the novatory stipulation which creates a new obligation to take the place of one already constituted. The basis of the distinction is above all doubt. While the novated and the novatory obligations necessarily arise from different constitutive causes, the two co-existing obligations making up a correal relation arise from one and the same constitutive cause, namely, a single joint stipulation.

This contrast enables us to see clearly wherein the jointness of a stipulatory act with a plurality of parties on the one side or the other consists, namely, in the requirement that the interrogatory, addressed to or by the various parties, must be complete before any response is given. Of course, when the interrogatory comprises merely a single question, the fulfilment of this condition is a matter of course, and the only case which we have to observe is where the interrogatory is divided into two or more questions. Here, if one question is put and the answer given thereto before the other question is put, then, even though the other question and answer follow at once, the result is two simplex stipulations, and not a single joint one. All this is explained with perfect lucidity in *Inst.* III. 16 pr.¹

As regards the response, even though the answers be given separately, the one after the other, the second answer cannot possibly have any novatory effect, because its antecedent is a question put before the first answer was given. The two answers relate to one and the same interrogatory; hence the fact

prudence admitted such a derogation in order to allow a sponsor or fidepromissor to be taken bound separately from his principal; cp., meanwhile, my restoration of D. (45. 2) 3 pr., *infra*, p. 53. As to the post-classical and Justinianian law of novation, *vide infra*, p. 211 ff.

¹ *Infra*, p. 65 ff.

of their not being given precisely at the same moment is ignored, and the two obligations are deemed to arise simultaneously.

§ 9. Authorities (§ 8).

(1) *Inst.* III. 16 pr., 1 will be considered later.¹

(2) D. (45. 2) 3 pr. Ulpian. XLVII. ad Sabin.

a. In [*duobus reis promittendi*] < ~ >² frustra timetur novatio,

β. [*nam licet ante prior responderit, posterior*] etsi ex intervallo accipiatur, [*consequens est dicere pristinam obligationem durare et sequentem accedere*]:

γ. [*et*] < ~ + >³ parvi refert simul < - >⁴ [spondeant] < ~ >⁵ < - + >⁶ an separatim [promittant], cum [*hoc actum inter eos sit*] < ~ >⁷ ut [*duo rei*] < ~ >⁸ [constituantur] < ~ >⁹,⁹ [neque] < ~ >¹⁰ ulla novatio [fiat] < ~ >.¹¹

Every one will admit that this principium has suffered greatly at the hands of the Compilers, and in my opinion it originally referred, not to the relation of duo rei promittendi at all, but to that of principal debtor and sponsor or fidepromissor.¹²

In the first place I observe that almost all the fragments we possess from the forty-seventh book of Ulpian's Sabinus-commentary have some relation

¹ *Infra*, p. 65 ff., 124 ff.

² *sponsore vel fidepromissore adiciendo*

³ nam (from β)

⁴ *cum reo*

⁵ spondeat

⁶ *vel fidepromittat*

⁷ *ita interrogetur, interrogatus sit, interrogatio facta sit*; or the like.

⁸ *sponsor vel fidepromissor*

⁹ constitutur

¹⁰ neve

¹¹ fiat

¹² Lenel, *Pal.* II. col. 1183, adds the following note to period α: Similis quaestio oritur si postea adpromissor adiciatur, cum expromissio isdem verbis fieri possit atque adpromissio.

to suretyship, and there is apparently a close connection between this pr. and D. (46. 1) 6.¹ In the second place any suggestion that a classical correal stipulation might result in novation would be absurd. In the third place the opening words of period α "in duobus reis promittendi" standing alone are harsh—a gerundive "constituendis" or "faciendis" should have been added. In the fourth place the statement in period β that solidarity could be created by the accession of a fresh obligation to one already constituted is now universally admitted to be interpolated in accordance with Justinian's constitution C. (8. 41 (42)) 8. In the fourth place period γ as it stands is obviously impossible, and there can be little doubt that the Compilers have here made an exceedingly clumsy adaptation of Ulpian's original text. Finally the whole pr., however inelegant its diction, is perfectly intelligible from the standpoint of the Justinianian law, as we shall see later.²

Believing as we do that Ulpian's original text related to sponsio and fidepromissio, we shall reserve detailed discussion thereof for our treatise on Accessoriality. We have, however, noted meanwhile certain suggested restorations which, if substantially well-founded, are of immense importance for a proper understanding of the institutes of sponsio and fidepromissio.

(3) D. (46. 1) 43. Pomponius VII. ex var. lect.

a. Si a Titio stipulatus [*fideiussorem*] < ~ > ³
te acceperim, deinde eandem pecuniam ab
[*alio*] < ~ > ⁴ stipulatus alium [*fideiussorem*]
< ~ > ⁵ accipiam < — > ,⁶

¹ See Lenel, l.c. and Krüger, *Dig.*

² *Infra*, p. 219 f.

³ *sponsorem*

⁴ *eodem Titio*

⁵ *sponsorem*

⁶ *te non liberari constat*

β. < - > ¹

γ. < - > ² [*confideiussores*] < ~ > ³ [*non*] erunt
 < - > ⁴ [*quia*] < ~ > ⁵ *diversarum stipula-*
tionum [*fideiussores*] < ~ > ⁶ sunt.

Undoubtedly this fragment *prima facie* conflicts with our doctrine regarding novation. Naturally interpreted, it means that if I first stipulate from T.: “decem dari spondes?” and take you bound as fideiussor for T., and then I stipulate from a third party M.: “(eadem) decem quae Titius mihi dare spondit, dari spondes?” and take a fourth party S. bound as fideiussor for M., in such case you and S. are not co-fideiussors (for the purpose of *beneficium divisionis*), because you are fideiussors of different stipulations. But according to our theory the stipulation from M. must novate the pre-existing obligation of T., and hence must free you, as T.’s fideiussor, altogether. The whole decision thus becomes meaningless.

If we accept the fragment as genuine, the only way to get over the difficulty is that suggested by Levy.⁷ That is to say, we must suppose the stipulation from M. to have run simply, “decem dari spondes?” so that formally we have two quite independent obligations *decem dari* between me and T. and between me and M. respectively. But we must further suppose that materially both these obligations are designed to satisfy the same economic interest on my part; for example, I have made a single loan of x to T., and the subsequent promise by M., with S. as fideiussor, was intended merely to

¹ *nam duos pluresve sponsores eiusdem debiti separatim accipi posse procul dubio est:*

² *sed et*

³ *consponsores*

⁴ *ita ut per legem Furiam inter eos dividatur obligatio*

⁵ *quamquam*

⁶ *sponsores*

⁷ *Sponsio*, p. 160 ff.

serve as a further security for this loan. In such a case the praetor will certainly prevent me from recovering more than a single sum of x, so that a legal cumulative relation is reduced to equitable solidarity.¹ What Pomponius, according to this interpretation, decides is that no beneficium divisionis can be granted to fideiussors who accede to different obligations standing in a merely equitable solidary relation to one another.

Though the foregoing interpretation cannot be pronounced impossible, to my mind it appears extraordinarily improbable. I cannot believe that Pomponius would here have used the expression "eandem pecuniam" otherwise than to denote a sum of money identified with another sum by means of the stipulatory formula: "(eadem) decem quae Titius mihi dare spopondit . . .", and such identification, according to our theory and Levy's, produces novation.

In my opinion, then, either this fragment must be pronounced interpolated or our theory must be revised, and I have little hesitation in deciding in favour of the former alternative. In the first place it is to be observed that the fragment is perfectly intelligible from the standpoint of the Justinianian law,² which we know to have differed strongly from the classical system in all matters of solidarity, suretyship, and novation, and this fact at once arouses suspicion. In the second place we note the inelegancy of "erunt" and "sunt" standing in such close proximity each at the end of its clause, and also the fact that, as the passage now runs, both these verbs should be in the second person plural. In the third place experience teaches us always to be on the

¹ *Vide infra*, p. 192 ff.

² *Vide infra*, p. 220.

look-out for a substitution of fideiussio for sponsio (fidepromissio), and when a passage purporting to deal with the former is in any way doubtful, the chances of this substitution are greatly magnified.

In point of fact I believe that Pomponius's original argument must have referred to the case where I first stipulate from T. and take you bound as sponsor, and then I stipulate again for the same prestation from the same T. and take another party bound as a second sponsor. I have suggested in the notes a possible restoration, but detailed consideration of this case must be reserved for my study on Accessoriality.

(4) D. (46. 2) 8. 5. Ulpian. XLVI. ad Sabin.

α. Si $\langle - \rangle$ ¹ ab [alio] $\langle \sim \rangle$ ² [promissam]
 $\langle \sim \rangle$ ³ sibi [dotem] $\langle \sim \rangle$ ⁴ maritus
 $\langle - \rangle$ ⁵ [ab uxore] $\langle \sim \rangle$ ⁶ dotis nomine
 stipulatus sit, non duplari dotem sed fieri
 novationem placet, $\langle - \rangle$ ⁷

β. [si hoc actum est: quid enim interest, ipsa an
 alius quilibet promittat?]

γ. $\langle - \rangle$ ⁸

δ. quod enim ego debeo si alius promittat,
 [liberare me potest,] $\langle \sim + \rangle$ ⁹

ε. [si novationis causa hoc fiat: si autem non
 novandi animo hoc intervenit, uterque quidem
 tenetur, sed altero solvente alter liberatur:]

¹ pecuniam quam alius uxori debebat,

² illa ³ dictam

⁴ doti, ⁵ iniussu illius

⁶ a debitore

⁷ ita ut uxor a marito liberetur:

⁸ sed verius est dicere debitorem ab uxore iure non liberari:

⁹ liberat me etiamsi nolim: (from η)

ζ. non tamen si quis stipuletur quod mihi debetur, aufert mihi actionem, nisi ex voluntate mea stipuletur.

η. [liberat autem me is qui quod debeo promittit, etiamsi nolim.]

This paragraph has evidently undergone fundamental alterations at the hands of the Compilers. Only the general statements in periods δ-η properly fall within the scope of the present treatise.

That period ε is entirely due to the Compilers no one at the present day will be inclined to dispute; for it states precisely the combined result of Justinian's constitutions C. (8. 41 (42)) 8 and (8. 40 (41)) 28.¹ Furthermore, in my opinion it is practically certain that the conclusion of δ was "liberat me etiamsi nolim," and that Ulpian's argument ended with ζ. The antithesis plainly is between passive novation which takes effect irrespective of the wishes of the original debtor, and active novation which requires the original creditor's consent. The Compilers, in order to prepare the way for ε, have changed the termination of δ to "liberare me potest," and they have further constructed a new period, η, at the end of the paragraph to contain the rule that the original debtor's consent was not necessary to passive novation.

As the "enim" in δ shows, the statement of the contrast between active and passive novation was intended to serve as motive for the preceding decision in periods α and β. But in these latter periods also the Compilers' hands are manifest. The words "si hoc actum est" in β are now generally admitted to be interpolated on the ground

¹ *Vide infra*, pp. 211 f., 221, 226 f., 233.

of C. (8. 41 (42)) 8, and I have no hesitation in deleting as well the rhetorical question which makes up the remainder of the period. Again, as regards α , there can be little doubt that the words "promissam sibi dotem" originally ran "dictam sibi doti," and there can be equally little doubt that the Compilers have in other respects recast Ulpian's statement of facts.

Further discussion of this paragraph properly belongs to treatises on dotal law and novation; a suggested restoration of periods α and γ is, however, given for what it is worth.

§ 10. Solidarity (Correality) *versus* Cumulation.

By cumulation we mean the co-existence of two obligations in such a relation that no fact bearing on the one alone has an "extensive" action on the other. From the standpoint of the strict civil law, this signifies precisely that *litiscontestatio* under the one has no effect on the other; for in the absence of extensive process-consumption the civil law did not attribute extensive consuming power to *solutio* or any other fact. The mature classical jurisprudence, however, as we shall subsequently attempt to prove,¹ recognised a relation in which *solutio*, but not *litiscontestatio*, had extensive consuming power, in other words a relation of simple solidarity.

In this section we have to consider what is the element in the correal stipulation which excludes cumulation. The distinction between generic and specific prestation-objects² must here be taken into account.

(A.) *Obligations with Generic Prestation-Object.*—

¹ *Infra*, p. 147 ff.

² *Vide supra*, p. 16 f.

Let us consider in the first place the ordinary form of joint interrogatory with double questions :¹—

Form J.

Titius : Maevi, decem dari spondes ?

Sei, eadem decem dari spondes ? etc.

It is commonly said that cumulation is here excluded by the inflexion of *idem* (*eadem*),² and the literal accuracy of this statement is undeniable. *Eadem* expressly identifies the x mentioned in the second question with the x mentioned in the first, and two cumulative obligations can never have one and the same generic prestation-object. Otherwise stated, the express identification of the two equal generic prestation - objects ipso facto excludes cumulation.

The matter does not, however, end there. Let us now consider a joint interrogatory with a single distributive question :—

Form K.

Titius : Maevi, Sei, uterque vestrum mihi (*eadem*) decem dare spondet ?

Suppose *eadem* (= *una*)³ be omitted, can it be said that M. and S. are liable cumulatively ? The answer must, I believe, be a decided negative. Why ? Simply because a single stipulatory act can never produce obligations in solidum⁴ which are cumulatively related. The term *eadem*, therefore, if inserted, has no special force at all. So in D. (45. 3) 29,⁵ the stipulation by the common slave would, I believe,

¹ For the sake of brevity we now mention the passive case alone in our examples.

² Or *is* (*ea*) : *vide supra*, p. 39, n. 1. ³ Cp. *supra*, l.c.

⁴ Pro rata obligations are cumulatively related ; *vide supra*, p. 30.

⁵ *Supra*, p. 43 f.

have precisely the same effect if the *eadem* before the second *decem* were omitted, though its elegance would no doubt be somewhat impaired. A common slave cannot by a single stipulatory act confer cumulative rights in solidum on his co-owners, and *eadem* serves to show that he has no intention of attempting such an impossibility.

Returning now to Form J we ask, What would be the effect of the omission of the term *eadem* in the second question?¹ In my opinion we must reject any theory that such omission would render M. and S. liable cumulatively. What it actually does is to destroy the formal connection of the two questions as parts of one and the same interrogatory, with the result that the stipulatory act becomes legally null and void, either in whole or in part.

Thus, suppose the stipulation to run :—

Form L.

Titius : Maeui, decem dari spondes ?

Sei, decem dari spondes ?

Maeuius : spondeo.

Seius : spondeo.

Here between the question to M. and his answer there intervenes a formally unconnected question to S., which latter question must, it is thought, be deemed an *aliud negotium* rendering M.'s promise legally void on the ground of non-continuity of act.² On the same ground S.'s promise is legally void through the intervention of M.'s answer between the question to him

¹ We have already dismissed the idea that this term has anything directly to do with the exclusion of partition, so that the effect of its omission cannot be to render M. and S. liable pro rata merely ; *vide supra*, p. 39, n. 1.

² *Vide infra*, p. 92.

(S.) and his answer. The stipulatory act is, therefore, wholly null and void.

Suppose, however, the stipulation to run :—

Form M.

Titius : Maevi, decem dari spondes ?

Sei, decem dari spondes ?

Seius : spondeo.

Maevius : spondeo.

Here S.'s promise is legally valid, because nothing intervenes between the question to him and his answer; but M.'s promise is legally void on the ground of non-continuity of act. The stipulation, therefore, is only partially void, a valid simplex obligation between T. and S. being created.

We now perceive the possibility of construing the *eadem* in Form J in a somewhat fresh light, namely, as the link connecting the two parts of one and the same joint interrogatory. If this connection is once established the joint interrogatory itself will identify the two sums of *x* as one and the same sum, so that cumulation is excluded just as if a single question had been employed. Moreover, the two questions may, we think, be connected otherwise than by the use of *eadem*. For example, if the stipulation were to run :—

Form N.

Titius : Maevi, decem dari spondes ita ut tu et

Seius duo rei promittendi fiat?

Sei, decem dari spondes ita ut tu et

Maevius duo rei promittendi fiat?

its validity would seem beyond doubt. By far the most convenient way of establishing the connection was, however, by means of an inflexion of *idem* (*is*),

which expressly identifies the two generic prestation-objects as one and the same.

(B.) *Obligations with Specific Prestation-Object.*—

Though evidence on the point is lacking, we cannot doubt that the proper form of joint stipulation with separate questions was :—

Form O.

Titius : *Maevi*, *Stichum servum dari spondes* ?

Sei, *eundem Stichum servum dari spondes* ?

Here, however, the term *eundem* is quite incapable of excluding cumulation. It serves, indeed, expressly to identify the *Stichus* mentioned in the second question as the same slave as the *Stichus* mentioned in the first, but two or more obligations with the same specific prestation-object may quite well stand in a cumulative relation. Moreover, any express identification of the two *Stichus*'s in the stipulatory formula is really superfluous. Before there can be any possibility of a joint stipulation for *Stichus*, the "individuality" of this slave must in the first place be ascertained. Here we see the difference between a specific prestation-object which has, and a generic prestation-object which has not, a concrete existence apart from the stipulation.

What, then, is the element in Form O which excludes cumulation? Only one answer is possible, namely, the unity of the stipulation itself. Suppose a single distributive question had been used :—

Form P.

Titius : *Maevi*, *Sei*, *uterque vestrum Stichum servum dari spondet* ?

Any idea that M. and S. are here liable cumulatively must be dismissed, and the fact of the

interrogatory being split up into two separate questions cannot make any difference to the result. The essential function of *eundem* is therefore to connect the two questions as parts of one and the same interrogatory, and its omission will, as before, have the effect of rendering the stipulatory act legally void in whole or in part.

It is instructive to compare the results above attained with the case of novation.

(A) If M. owes x to T. and the latter subsequently stipulates from S.: “(eadem)¹ decem quae Maevius debet, dari spondes?” the words “quae M. debet” expressly identify the x promised by S. with the x already due by M. Accordingly S.’s promise must novate the pre-existing obligation of M., for both cannot cumulatively owe the same sum of x.

(B) If M. owes Stichus to T. and the latter subsequently stipulates from S.: “(eundem) Stichum quem Maevius debet, dari spondes?” the words “quem M. debet” certainly identify the Stichus promised by S. with the Stichus already due by M., but this identification does not of itself produce novation; it is perfectly possible for M. and S. to owe the same slave Stichus cumulatively. In order that novation may take place, and there can be no doubt that it does so, the law must give the stipulation from S. an import beyond that which it naturally bears, the import, namely, that S. here assumes the same liability to render Stichus as M. had previously been under.

¹ *Vide supra*, p. 50, n. 1.

§ 11. Authorities (§ 10).

(1) *Inst.* III. 16 pr.

a. Et stipulandi et promittendi duo pluresve rei fieri possunt.

β. stipulandi ita, si post omnium interrogationem promissor respondeat "spondeo" :

γ. ut puta, cum duobus separatim stipulantibus ita promissor respondeat "utrique vestrum dare spondeo" :

δ. nam si prius Titio spoponderit, deinde alio interrogante spondeat, alia atque alia erit obligatio nec creduntur duo rei stipulandi esse.

ε. duo pluresve promittendi ita fiunt¹: "Maevi, quinque aureos² dare spondes? Sei, eosdem² quinque aureos² dare spondes?", respondeant³ singuli separatim "spondeo."

This important principium has a bearing on partition and novation as well as on cumulation, but we have postponed consideration thereof until now, in order to give a single exegesis of the whole. § 1 will be dealt with later.⁴

We may safely infer from § 2⁵ that the entire title *de duobus reis stipulandi et promittendi* (III. 16) of Justinian's *Institutes* is taken from the eighth book of Florentine's *Institutes*, but there is every reason to believe that the Compilers have manipulated extensively the classical original. In particular the

¹ "Ut interroget stipulator" vel simile quid inter "fiunt" et "Maevi" a compilatoribus male deletum censet Mommsen (Krüger, *Inst.*).

² Presumably the classical original had "sestercia" and "eadem."

³ Var. lect. : *et* resp. ; *si* resp.

⁴ *Infra*, p. 124 ff.

⁵ *Vide infra*, p. 98 f.

pr. seems to contain only an abbreviated version of Florentine's exposition, designed to give Byzantine students a general idea of the correal stipulation which was now practically obsolete.¹

A careful examination of the pr. seems to disclose two distinct lines of argument which at the Compilers' hands have become hopelessly intermingled. These deal respectively with (i) the joint form which excludes novation and cumulation, and (ii) the distributive form which excludes partition.

(i) Periods β and δ , referring to the active case, are immediately connected. The debtor, it is laid down, must not reply until the joint interrogatory is complete. If he replies to the one creditor before the other has put the question, then we have two separate stipulations, not a single joint one, and the result cannot be correality.²

(ii) By way of contrast to β and δ , periods γ and ϵ seem to have in view the exclusion of partition. In γ we note the insistence on separate questions (*duobus separatim stipulantibus*), though the splitting up of the interrogatory can have had nothing to do with the exclusion of novation and cumulation; again, in ϵ the form with separate questions is realistically portrayed. As regards the response, period γ (referring to the active case) gives a single answer in distributive form, while period ϵ (referring to the passive case) gives two separate answers. In all this, it can hardly be doubted, Florentine was seeking

¹ *Vide infra*, p. 213.

² As to the effect of the form :

Maevius : Titi, decem dari spondes ?

Titius : spondeo.

Seius : Titi, eadem decem dari spondes ?

Titius : spondeo,

vide infra, p. 160 f.

to exemplify the distributive framework of the common form of correal stipulation, namely, separate questions in the active and passive cases alike, separate answers in the passive case, a single answer (distributively conceived) in the active case. It does not follow that the classical jurisprudence insisted on a rigid adherence to this form, provided always the interrogatory were distributive, but we may infer that any departure therefrom was regarded as unorthodox.

If the foregoing observations be sound, we may surmise that Florentine dealt separately with the joint and distributive qualities of the correal stipulation, though any attempt to restore his argument would be futile.

- (2) D. (45. 3) 28. 2. Gaius III. de verb. obligat.
 Si ipsi domini singuli eadem decem servo
 communi dari fuerint stipulati, et semel
 responsum secutum fuerit, duo rei stipu-
 landi erunt, cum placeat dominum servo
 dari stipulari posse.

Here we have a correal stipulation :—

Maevius: Titi, decem Sticho servo communi meo
 et Seii dari spondes?

Seius: Titi, eadem decem Sticho servo communi
 meo et Maevii dari spondes?

Titius: spondeo *or* Maevi, spondeo—Sei, spondeo,

and, like most other examples where a common slave is introduced, the case is highly instructive. We note the careful way in which Gaius sets forth the different elements necessary to the production of a correal relation. “Singuli fuerint stipulati” denotes a distributive interrogatory consisting, no doubt,

of separate questions. "Eadem decem" denotes an identification of the two sums of x. "Semel responsum secutum fuerit" denotes a single joint response given after both questions have been put; it is apparently indifferent whether this response consist of one answer given to both questions or of two separate answers.¹

Thus the present paragraph seems to bear out in all respects the conclusions which we have arrived at in our foregoing discussions.

- (3) D. (45. 1) 38. 19. Ulpian. XLIX. ad Sabin.
Eum qui dicat : "mihi decem² et Titio decem,"
eadem decem, non alia decem, dicere credendum est.

Lenel's proposal to delete the first "decem" as a gloss seems to destroy the whole point of this paragraph. In order to discover Ulpian's true meaning, we must make the highly probable assumption³ that he adopted the Proculian view as to the effect of a stipulation *sibi et alii dari*,⁴ and then look at the preceding § 18: "in stipulationibus cum quaeritur quid actum sit, verba contra stipulatorem interpretanda sunt."⁵

Now consider a stipulation : "mihi decem et Titio

¹ "Semel responsum secutum fuerit" rather points to one answer (spondeo) given to both questions, but we must not interpret Gaius's words too narrowly; the form "Maevi, spondeo—Sei, spondeo" seems quite unexceptionable. A single answer in distributive form is not practicable here, because both obligations are for payment to one and the same party, namely, slave Stichus.

² Lenel (*Pal.* II., col. 1194) notat : decem gloss.?

³ *Vide supra*, p. 38, n. 3.

⁴ *Gai.* III. 103.

⁵ This rule is eminently reasonable. It is the duty of the stipulator to see that his interrogatory is free from all ambiguity, and accordingly, whether we are interpreting the terms of a stipulation directly or through the medium of a written cautio which records their purport, any doubtful point must be decided against him.

decem dari." If we can interpret this as equivalent to two independent stipulations: "mihi decem dari," and "Titio decem dari," clearly a full sum of x is due to me, though the stipulation in T.'s favour is invalid. If the stipulation in T.'s favour had been valid, the result would have been cumulation, the two sums of x not being identified in any way, and hence the detraction of T. leaves me still entitled to x . Ulpian, however, rejects this interpretation; the stipulation must have the same effect as if it had run: "mihi decem et Titio ~~eadem~~ decem dari." Why? Simply because the unity of the stipulatory act is totally inconsistent with the idea of cumulation. We are certainly entitled to apply this argument to the case of a joint stipulation; for the latter is essentially a single stipulatory act, though two or more persons on the one side or the other participate therein.

Here ends Ulpian's decision so far as recorded, and up to this point it is against the stipulator; the latter cannot maintain that separate sums of x were promised to himself and to T., in order to rebut the argument that he is only entitled to v . This decision, however, is manifestly incomplete, for the question at once arises whether the form "mihi decem et Titio decem dari," though it relates merely to a single sum of x , cannot be given a distributive interpretation, by virtue of which I can still claim the sum of x in full?

In this connection we may compare Julian. D. (45. 1) 56 pr.:

Eum qui ita stipulatur: "mihi et Titio decem dare spondes?" vero similis est semper una decem communiter sibi et Titio stipulari, sicuti qui legat Titio et Sempronio, non aliud intellegitur quam una decem communiter duobus legare.

This dictum of Julian's is carefully expressed, and decides two points in the case of a stipulation "*mihi et Titio decem dari*": (i) that one and the same (*una = eadem*) sum of *x* only is promised to both T. and myself, not different sums, and (ii) that this sum is promised to us "*communiter*," which can only mean that neither is entitled to more than a *pro rata* share. Hence though T. is detracted, I can still only claim a *pro rata* share; in other words, Julian, Sabinian though he be, here adopts the Proculian view.

The question now is whether, in the case of a stipulation, not "*mihi et Titio decem dari*," but "*mihi **decem** et Titio (eadem) decem dari*," the single sum of *x* should be regarded as promised to us, not simply jointly (*communiter*) as in the former case, but distributively jointly (*singulis in solidum*)? In my opinion, the probabilities are that this question should be answered in the affirmative; the iteration of "*decem*" (with or without an "*eadem*")¹ seems to have the effect of excluding partition, just like the use of separate questions in a joint stipulation. Hence the Proculian view in favour of partition only applied to the case of a stipulation "*sibi et alii decem dari*," not to the case of a stipulation "*sibi **decem** et alii decem dari*."

If the foregoing exegesis be sound, we must assume that the Compilers deleted the sequel to Ulpian's decision in fr. 38 § 19. Perhaps in this context Ulpian entered into a detailed discussion of certain aspects of the stipulation *sibi et alii dari*, which seemed of no practical importance from the standpoint of the Justinianian law.

¹ Cp. *supra*, pp. 39, n. 1; 61, n. 1.

§ 12. The Unity of Obligation.

Having now dealt with the negative functions of the correal stipulation, namely, the exclusion of partition, novation, and cumulation, we turn to its positive function, namely, the production of two or more co-ordinate principal obligations, which are, by construction of law, one and the same.

The idea of unity of obligation lies at the basis of accessorality as well as of correality, but there is an important distinction between the two cases. In accessorality the unity is reached through a one-sided identification; the accessory obligation is identified with the principal obligation, but not vice versâ. In correality, on the other hand, we have two obligations standing side by side on a co-ordinate footing, so that a merely one-sided identification is out of the question. The only example which the classical law affords of a merely one-sided identification as between co-ordinate obligations is in the case of novation, where a later obligation is identified with, and so supersedes, an earlier one.

In the case of correality, then, unity of obligation can only be reached (i) directly through a reciprocal identification of two principal obligations; or (ii) indirectly through each of two obligations being accessorially related to the same principal obligation, and therefore being in a sense correally related to one another. The second of these relations, which we call "accessory correality" and which shows the unity of obligation only to an imperfect extent, will be dealt with in our treatise on Accessorality. In the present work we fix our attention exclusively on the first relation, which, if need be, we describe particularly as "principal correality."

Numerous passages can be quoted where the classical jurists refer to correally or accessorially related obligations as one and the same. For example :—

- Julian. D. (46. 3) 34. 1 : “obligatio communis” ;
 Pomponius D. (45. 2) 19 : “exemptus est obligatione” ;
 Ulpian. D. (46. 4) 16 pr. : “ex duobus pluribusque eiusdem obligationis participibus” ;
 Paul. note to Papinian. D. (45. 1) 116 : “duo rei Maevius et Titius eiusdem obligationis” ;
 Paul. D. (46. 8) 14 : “eiusdem obligationis socius.”¹

That this unity of obligation was an objective unity is brought out by such passages as the following :—

- African. D. (46. 1) 21. 4 : “eiusdem pecuniae rei” ;
 Pomponius D. (45. 2) 18 : “ex duobus reis eiusdem Stichi promittendi factis” ;
 Papinian. D. (26. 7) 38 pr. : “eiusdem pecuniae debitores” ;
 Paul. D. (2. 14) 21. 5 : “qui eiusdem pecuniae exactionem habent in solidum,” “eiusdem pecuniae debitores” ;
 Paul. D. eod. 9 pr. : “unum debitum” ;
 Paul. D. (26. 7) 45 : “duo rei eiusdem debiti” ;
 Paul. D. (46. 1) 71 pr. : “duo rei eiusdem debiti,” “alterum reum eiusdem pecuniae” ;
 Diocletian. C. (8. 39 (40)) 1 (2) : “duo rei promittendi eiusdem pecuniae.”

¹ Cp. also Paul. D. (9. 4) 19 pr. (relating to noxal actions) “una obligatio.” As to Ulpian. D. (45. 2) 3. 1 : “cum una sit obligatio, una et summa est,” *vide infra*, p. 126 ff.

On the other hand, in certain passages we find a plurality of obligations mentioned ; for example, in

Ulpian.-Julian. D. (46. 1) 5¹ and Veneleius D. (45. 2) 13 ; also,
African. D. (46. 1) 21. 1 : “ut fideiussor duabus obligationibus eiusdem pecuniae nomine teneatur.”

There is nothing inconsistent in these different modes of expression. If we wish to emphasise the “objective unity,” we say that there is one obligation, one debt, one prestation, and so forth ; if we wish to emphasise the “subjective plurality,” we say that there are as many obligations, etc., as there are parties on the one side or the other. All this is perfectly natural and does not imply any idea of a correal obligation as a mystic “two or more in one.” The terminology of the Roman jurists agrees essentially with our own ; sometimes we find it convenient to speak of a “single correal obligation,” at other times of “two or more obligations correally related.”

To the whole idea of unity of obligation as here conceived there is frequently opposed an objection which may be stated thus : An obligation is essentially a relation between a particular creditor and a particular debtor ; the object of such a relation, that is to say, the prestation to be rendered, e.g., *decem dari*, has no “individuality” of its own apart from the particular subjects of the relation ; a *decem dari Maevio* cannot in any sense be identical with a *decem dari Seio*, nor a *decem dari a Maevio* with a *decem dari a Seio*. In short, the whole theory of objective unity with subjective plurality is impossible ; we cannot operate with

¹ Vide *infra*, p. 132 ff.

the objective element in an obligatory relation apart from the subjective element; a subjective difference implies an objective difference likewise.

The reply to this argument simply is that we are dealing with jurisprudence, not metaphysics; the objective identity which we speak of is something purely juristic, being constructed to serve definite legal ends—to provide a theoretical basis for certain practical results. Moreover, there is nothing repugnant to common sense in the conception of a single objective obligation with a plurality of subjective relations—any intelligent layman to whom this conception is explained will at once appreciate its reasonableness—and this being so the lucubrations of our would-be legal philosopher may be summarily dismissed.

The idea of objective unity of obligation must now be analysed with the greatest care. Two obligations are objectively one and the same when they contain one and the same prestation. This identity of prestation implies an identity both of prestation-object and of prestation-content; both obligations must “dispose” of one and the same thing, and both “dispositions” must be one and the same.

In the first place we must distinguish objective unity of obligation from mere unity of juristic end. The fact that two obligations *decem dari* are directed to the same juristic end (are based on the same material cause, are designed to satisfy the same economic interest)¹ does not of itself render them objectively one and the same—does not make the two prestations of x one and the same prestation of this amount. In order that objective unity may

¹ *Vide supra*, p. 12, n. 1.

result, the two prestations must be identified, in the case of formal negotia, by some formal process—in the case of formless negotia, by the common intention of parties. When, however, this identification is achieved, the unity of end, which is an essential element in all solidarity, is merged in a larger unity of obligation.

Unity of juristic end without objective unity of obligation can best be illustrated by the contract of mandate¹: M. and S., each independently of the other, give T. separate mandates to lend x to Gaius; T. treats these mandates as referring to one and the same loan of x which he duly makes to G.; G. fails to repay this loan. Both M. and S. are liable to pay x to T., but the latter will certainly be prevented—whether at law or merely in equity does not here concern us—from exacting more than a single payment of this amount: the two obligations are directed to one and the same juristic end. Yet these obligations are not objectively one and the same—M. and S. do not owe one and the same prestation of x but different prestations—because, the two mandates having been given independently of one another, there was no common intention on the part of M. and S. such as would effect the necessary identification. The unity of juristic end without objective unity of obligation which appears in simple solidarity *ex stipulatu* will be discussed later.²

In the second place we must observe that two obligations cannot be identified objectively unless they are objectively equal in every respect.

As regards prestation-object the question of equality presents no difficulty. Two generic prestation-objects are equal when they consist of equal sums of money, of equal quantities of the same fungible genus (other

¹ Cp. *infra*, pp. 317 ff., 322, 334 f.

² *Infra*, p. 153 f.

than money), of an equal number of indeterminate species of the same non-fungible genus. Two specific prestation-objects cannot be equal without being identical.¹

The case of the prestation-content is more complicated. In order that two prestation-contents may be equal the following conditions must be fulfilled :—

(i) The two acts must be homogeneous, *i.e.*, belong to the same category of act.

(ii) The modalities, if any, to which each act is subject must coincide. This rule does not apply to modalities of condition and term, which were deemed to belong to the obligation-content, not to the prestation-content.² But, though authority on the point is lacking, it would appear that modalities of place were treated as part of the prestation-content, and if this be so, an obligation *decem Romae dari* and one *decem Capuae dari* must be pronounced unequal.

(iii) In each case the debtor must incur the same degree of responsibility for failure to perform the act. As regards obligations *dari* this point practically arises only where the prestation-object is specific.³ Thus suppose we have two obligations *Stichum dari*, and in one of them the debtor is liable if he fails to give Stichus through culpa, while in the other he is only liable if his failure be due to dolus, clearly these obligations are unequal in prestation-content.

In the third place we have to note what the mutual identification of two equal prestations precisely signifies.

Identity of prestation-object requires no remark

¹ *Vide supra*, p. 17.

² *Vide supra*, p. 13 f.; *infra*, p. 95 f.

³ It can never arise in the case of obligations *pecuniam dari*, and only under very exceptional circumstances can it arise in the case of other obligations *dari* with generic prestation-object.

where the latter is a determinate species. Nor does the identification of two equal generic prestation-objects present any serious difficulty. A generic prestation-object has no "individuality" of its own, but is endowed with a concrete existence simply for the purposes of the particular obligation. Hence there is nothing to prevent us endowing a single sum of money, a single quantity of a fungible genus (other than money), a single number of indeterminate species of a non-fungible genus, with a concrete existence as the common prestation-object of two obligations.

The identification of two equal prestation-contents, on the other hand, is a more abstract process. (i) We must identify the two equal acts as one and the same act. For example, if M. and S. each promise x to T., identification of the two prestation-contents implies that the *a Maevio dari* and the *a Seio dari* are deemed one and the same act, irrespective of the subjective difference. This being done, the identification of the equal modalities, if any, affecting the two acts, follows as a matter of course. (ii) We must identify the two equal responsibilities for failure to perform the aforesaid one and the same act. What does this mean? As regards the passive case the only possible meaning seems to be that the responsibility of each debtor is rendered "extensive"; in other words, mutual extensive responsibility seems to be a necessary element in mutual identification. For example, if M. and S. are bound each to render Stichus to T., and each is liable if he fails to fulfil this duty through culpa, identification of the two prestation-contents seems to imply that each is liable on the ground of the other's culpa as well as of his own. As this question of extensive responsibility as between correal debtors is a much debated one,

we shall devote the next section¹ specially to its discussion.

As regards the active case, *e.g.*, where T. is bound to render Stichus to M. and S., and is liable to each for culpa, identification of the two prestation-contents implies that any culpa incurred towards the one of the creditors, has the same effect as if it had been incurred towards the other likewise. This point is, however, of no practical importance.

In the fourth place we have to note that the essential factor in objective identification differs according as the prestation-object is (*a*) generic, or (*b*) specific.

(*a*) Where two obligations have equal generic prestation-objects, say x, and we identify these as one and the same, then, if in addition the two prestation-contents are equal, identification of the latter and therefore full identity of prestation will naturally follow, unless there be some special element in the case which excludes identification, as, for example, where two parties stipulate correally *dotis nomine*.²

(*b*) Specific prestation-objects cannot be equal without being identical. Hence, before there can be any question of identity between two obligations with specific prestation-objects, the latter must first be admitted to be one and the same. This identity of prestation-object does not, however, imply identity of prestation, even though the two prestation-contents be equal, for two obligations may have one and the same specific prestation-object and yet be related cumulatively. In order then to achieve identity of prestation, our efforts must be directed to identification of the two prestation-contents.

The essential factor in case (*a*) is therefore

¹ *Infra*, p. 80 ff.

² *Vide infra*, pp. 108, 166 ff.

identification of the two prestation-objects, in case (b) identification of the two prestation-contents.

Having thus endeavoured to bring out all that is implied in the mutual objective identification of two principal obligations, we now enquire regarding the stipulatory means for producing this identification. There can be no doubt as to the decision of the civil law on this point. Two co-ordinate principal obligations *ex stipulatu* can only co-exist as one and the same when they arise from one and the same joint stipulation, the latter being distributively framed in order to avoid partition. The joint nature of the *correal* stipulation identifies the two resulting obligations reciprocally, gives them the quality of co-ordinate branches of a single *correal* obligation, and in no other way can principal obligations *ex stipulatu* become so related under the civil law. Unity of originating cause is essentially inconsistent with novation, because in the case of the latter we have merely a one-sided identification by virtue whereof an existing obligation is superseded by a fresh one. Likewise, unity of originating cause is, strictly speaking,¹ inconsistent with *accessoriality*, because in this case we have merely a one-sided identification which places the one obligation in a subsidiary relation to the other. But unity of originating cause is essentially consistent with *correality*, for it presents the palpable means of constituting two co-ordinate principal obligations, which from the first moment of their existence are mutually identified the one with the other.

¹ The classical jurisprudence, however, seems to have tolerated a joint stipulation in which a principal debtor and *fideiussor* were taken bound together ; this will be explained in my treatise on *Accessoriality*.

§ 13. Extensive Responsibility.¹

Paul says, D. (45. 1) 91. 3: Sequitur videre de eo quod veteres constituerunt, quotiens culpa intervenit debitoris perpetuari obligationem, quemadmodum intellegendum sit. et quidem si effecerit promissor quo minus solvere possit, expeditum intellectum habet constitutio: si vero moratus sit tantum, hæsitatur an, si postea in mora non fuerit, extingatur superior mora.

Here at first sight we appear to have recorded an ancient maxim, "quotiens culpa intervenit debitoris, perpetuatur obligatio" (or, as it is commonly abbreviated by modern writers, "culpa perpetuatur obligatio"), which covers two cases: (i) that of wrongful act or neglect on the debtor's part, causing loss or deterioration of the prestation-object, so that specific performance becomes wholly or partially impossible—this is conveniently described as "culpa" in a special technical sense which includes actual *dolus*; and (ii) a wrongful failure on the debtor's part to fulfil the obligation at the proper time—in other words, *mora*.² In the first case the obligation is perpetuated in the sense that the debtor remains liable to pay the creditor's pecuniary *interesse*, though specific performance is now wholly or partially impossible; in the second case the obligation is perpetuated in the sense that the debtor remains similarly liable, where the prestation-object, subsequent to the default, is lost or deteriorates through a cause for which he would not otherwise

¹ See on the whole matter, Levy, *Konk.*, p. 210, n. 5.

² We cannot here discuss the conditions necessary to establish *mora*. Siber (ZSS., 29, p. 47 ff.) has disposed of the view that a formal "interpellatio" was in every case required under the classical law, or indeed under the Justinianian law either.

be responsible. Gradenwitz¹ has, however, proved that the formulation of the rule in the passage quoted must have been due to Paul himself, and cannot be a verbatim reproduction of the ancient maxim. Pomponius, D. (12. 1) 5, gives us an idea how the ancient maxim actually ran: "quod te mihi dare oporteat, si id postea perierit quam per te factum erit quo minus id mihi dares, tuum fore id detrimentum constat." The traditional mode of describing a party as in mora appears then to have been: "per eum factum est (stat, stetit) quo minus det (daret)," or the like. Furthermore, the case of "culpa," where the debtor "effecit quo minus dare possit (posset)," or the like, appears to have been regarded simply as an aggravated form of "per eum factum est quo minus det," and to have been governed by precisely the same principles. Paul's formulation of the rule in D. (45. 1) 91. 3 (cit.) is, however, perfectly intelligible. What he has done is to seize upon the element of "fault" inherent in both cases, and make this element the basis of a general doctrine of *perpetuatio obligationis*.

Now for our present purposes the significance of the results established by Gradenwitz lies in this, namely, that in applying the doctrines of "culpa" and mora to the correal obligation, we must abandon any idea of discriminating between their respective consequences. Suppose T. stipulates for Stichus from M. and S. correally, and subsequently sues M. on the contract; M. pleads in defence that the slave is dead, and the obligation is therefore extinguished; T., in replying, admits the death, but alleges either (i) that it occurred through "culpa" on the part of S. (Seius effecit quo minus Stichus dari posset), or (ii) that

¹ ZSS. 34, p. 255 ff.

it occurred after S. was in mora (postquam per Seium factum est quo minus Stichus daretur). Both these allegations have equal value or none at all; if T. is entitled to plead "culpa" on the part of S. as a ground of action against M., he is likewise entitled to plead mora, and vice versâ. The question we have to decide is, Are these pleas relevant or not? do "culpa" and mora on the part of one correal debtor infer liability to the other, or do they not?

The attempt in the foregoing section to work out the exact meaning of the objective identification of two co-ordinate obligations led us to the result that mutual extensive responsibility was an essential element in such identification; hence, a priori, we must answer the last question in the affirmative. Another consideration seems to favour the same result. Suppose M. and S. have correally promised Stichus to T., and S. through "culpa" kills the slave before delivery; T., however, sues M., erroneously thinking that the slave was killed by the latter; in iure, M. does not deny fault but simply joins issue. Under the classical law of process-consumption, S. is freed and T. loses all recourse against him, though the evidence at the trial, contrary to T.'s expectations, proves that he (S.) was the party really at fault. Hence, if M. cannot be condemned on the ground of S.'s fault, T. suffers a great hardship. Under these circumstances any impartial observer would, I venture to think, say that T., as a set-off to the disadvantage imposed on him by the extensive process-consumption rule, ought to have the advantage of being able to hold either debtor liable for the other's fault.

Now, let us glance at the position from the standpoint of the Justinianian law:—

(i) "**Culpa.**"—Extensive process-consumption being now abolished,¹ T. would in the case last figured be able to bring a subsequent action against S., the party actually at fault. Hence the equitable argument in favour of extensive responsibility no longer exists, and without any hardship each may be held liable for his own "culpa" only. "Culpa communis" alone necessarily infers liability to both.

(ii) **Mora.**—Just as in the case of "culpa," there no longer existed any equitable argument in favour of extensive responsibility. But, further, in cases where interpellatio is a condition precedent to mora, if the creditor addresses his interpellatio to one only of two correal debtors, a Justinianian lawyer would, we may be certain, at once infer that this debtor alone can be held responsible for failure to comply with the demand. If the creditor wished to hold both responsible, he should have interpellated both.

A priori, then, we are quite prepared to find the doctrine of extensive responsibility rejected by the Justinianian law. What have the authorities to say on the matter?

In the first place, Levy² has submitted a powerful argument in favour of extensive responsibility under the classical law in the case of co-tutors. He has proved that co-tutors jointly administering an undivided estate were correal debtors in the full sense, and that the one was responsible for all loss caused through maladministration on the part of the other. But, on the other hand, he has also proved that the Compilers have consistently interpolated the classical texts with a view to eliminating this extensive responsibility, and making each tutor liable for his own acts and omissions alone.

¹ *Vide infra*, p. 225 ff.

² ZSS., 37, p. 14 ff.; *Konk.*, p. 220 ff.

In the second place let us consider :—

D. (45. 2) 18. Pomponius V. ex Plaut.

Ex duobus reis eiusdem Stichi promittendi factis
alterius factum alteri quoque nocet.

Though the value of an isolated fragment like the present is small,¹ yet if we understand “factum,” as used by Pomponius,² in the natural sense of an act causing death or injury to Stichus, we have here a direct authority in favour of the view that correal debtors were extensively responsible. The only difficulty is why, assuming that under the Justinianian law a correal debtor was only responsible for his own “culpa,” the Compilers should have left this passage standing. The explanation may be that they meant the word “factum” to signify an act which interrupted the running of prescription; as is well known, Justinian, by C. (8. 39 (40)) 4 (5) of the year 531, provided that any act which interrupted prescription in favour of one correal creditor or against one correal debtor enured to the benefit or to the prejudice of both.³

In the third place we have to consider the two passages which, as they stand, affirm that each correal debtor was responsible for his own mora alone :—

D. (22. 1) 32. 4. Marcian. IV. regul.

Sed si duo rei promittendi sint, alterius mora
alteri [*non*] nocet.

¹ Moreover, close sequence of “factis” and “factum” is not very elegant; quite likely the Compilers have deleted something after “factis.”

² Cp. Paul. D. (26. 7) 14.

³ Cp. Binder, p. 273 f., who even imagines that the Compilers have interpolated Pomponius’s words so as to make them apply to this case. Binder, it may be remarked, opposes the theory of the extensive responsibility of correal debtors under the classical law.

D. (50. 17) 173. 2. Paul. VI. ad Plaut.

Unicuique sua mora nocet. quod et in duobus reis promittendi observatur.

Certainly neither of these passages inspires much faith in its own genuineness.

As regards the first we note that the fragment D. (22. 1) 32 has been much interpolated and that paragraphs 2-5 thereof lack concinnity. In all probability the Compilers, among other manipulations, inserted the "non" in our present § 4.

As regards the second passage, obviously little reliance can be placed on an isolated statement of this kind torn by the Compilers from its context. Doubtless there is a close connection between this passage and D. (45. 1) 88, which begins: "mora rei fideiussori quoque nocet." But why does the mora of a principal debtor enure to the prejudice of a fideiussor? Simply because an accessory debtor identifies his obligation with that of his principal. We have already seen, however, that correality implies a *mutual* identification of two obligations. It is, therefore, logically impossible for a fideiussor to be held responsible for mora of his principal debtor, and yet for one principal correal debtor not to be held responsible for mora of the other. Hence, whatever Paul did write in the passage now figuring as D. (50. 17) 173. 2—and speculation on this point seems in the present state of our knowledge futile—it is almost a certainty that he did not deny the extensive responsibility of correal debtors for mora, but rather affirmed the same.

We therefore feel justified in holding that in the case of a passive correal obligation, the classical law treated each co-debtor as liable for the "culpa" and mora of the other; that is to say, extensive responsi-

bility was an essential element in the passive principal¹ correal relation, assuming, of course, the concrete case to be such that a question of "secondary" liability actually arises.²

Conversely it would appear that on principle all "culpa" or mora which serves to perpetuate the obligation in favour of one of two correal creditors must do so in favour of the others also; but this case, as already remarked,³ is of no practical importance.

§ 14. Constitutive Requisites of the Correal Stipulation.

The "requisites" of a juridical act are the conditions precedent to its full validity as such. They may for the purposes of theoretical analysis be divided into two classes: (i) "constitutive" requisites, namely, those conditions the fulfilment of which gives a juridical act its existence as such, and on the non-fulfilment of any one of which we have no act at all; and (ii) "effective" requisites, namely, those conditions the fulfilment of which enables a constituted act to accomplish its end, and on the non-fulfilment of any one of which the act, though *ex hypothesi* existent, is either altogether futile or endowed with an efficacy less than normal. In this section the constitutive requisites of the correal stipulation will be dealt with.

According to the strict civil law the constitutive requisites of the stipulation in general were entirely formal⁴; the classical jurisprudence, however, added a material requisite, to wit, the fact of consensus.

¹ In our treatise on Accessoriality we shall see that the principle of extensive responsibility does not apply in the case of accessory correalty.

² *Vide supra*, p. 76, n. 3.

³ *Supra*, p. 78.

⁴ *Cum grano salis*; *vide infra*, p. 97, n. 2.

We shall consider separately, I. the formal requisites of the correal stipulation, and II. its material requisite. For the purposes of the following exposition only the common form of correal stipulation with separate questions and, in the passive case, separate answers need be taken into account. The necessity of a connection between the two questions¹ is assumed and will not further be referred to.

I. FORMAL CONSTITUTIVE REQUISITES.

The formal constitutive requisites of the correal stipulation fall under two heads :—

- (A) Those which are in the main applications of the formal constitutive requisites of the stipulation in general ; and
- (B) Those which depend more particularly on the nature of the correal stipulation as a single joint act.

(A) The formal requisites of the first class are as follows :—

(1) **Praesentia.**—All the parties on both sides must be present together at one time and place. A subtle point suggests itself as to whether the proceedings may be commenced before one of the co-creditors or co-debtors arrives. Thus, suppose T. and M. are present together alone, and T. puts the question : “*Maevi, decem dari spondes?*” Then S. comes on the scene, and T., after explaining to him what has occurred, says : “*Sei, eadem decem dari spondes?*” after which both M. and S. reply. Are M. and S. duly constituted correal debtors ?² In

¹ *Vide supra*, p. 61 f.

² Cp. the analogous cases mentioned in connection with the rule of “continuous presence,” *infra*, p. 91 f.

the absence of authority we may leave the learned reader to work out the results in this and similar cases according to his own appreciation of the position, it being always borne in mind that the mature classical jurisprudence may possibly have modified the strict civil law consequences.

(2) **Oral Interchange.**—The creditor must put an oral question to each debtor and each debtor must give an affirmative oral answer, or each creditor must put an oral question to the debtor and the debtor must give an affirmative oral answer covering both questions. If in the passive case only one of the debtors replies, or if in the active case the debtor replies to one creditor alone, *e.g.*, “*Maeui, tibi (soli) dare spondeo*,” of course we have no joint act, but the mature classical jurisprudence held that a valid “simplex” obligation was constituted.¹

(3) **Obligation.**—The interrogatory must be directed to the constitution of obligatory relations between the creditor and each debtor, or between each creditor and the debtor²; it may contain conditions or terms rendering these relations meanwhile imperfect or immature; the classical law permitted the questions of the interrogatory to differ modally as regards condition and term, *e.g.*, T.’s question to M. may be “pure,” while his question to S. is subject to a condition, and so forth.³

(4) **Spondere.**—The verb *spondere* can only be employed by Roman citizens. This rule calls for no remark.

¹ *Vide infra*, p. 96.

² An obligation connotes the rendering of a prestation in the future: *dari spondes? dabis? facies?* etc.; the use of the present, *das? facis?* etc., would render the stipulation inept. In acceptance the position was exactly the reverse; the obligation must be discharged instantaneously.

³ *Vide infra*, p. 95 f.

(5) **Correspondence**.—The response must “correspond” to the interrogatory, or more precisely, if the response consist of two answers, each of the latter must correspond to its own antecedent question—if it consists of a single answer the latter must correspond to both questions. The requisite of correspondence consists of two rules which we call the rules of “congruence” and “acquiescence” respectively.

(i) The rule of **Congruence** means that the principal verbs in the question and the answer must formally agree. Thus a question “spondes?” must be followed by an answer “spondeo,” a question “dabis?” by an answer “dabo,” and so forth. Consider now this stipulation:—

Titius: Maeui, decem dari spondes?

Sei, eadem decem dabis?

Maevius: spondeo.

Seius: dabo.

Is the rule of congruence here complied with? Yes, because each answer is congruent with its own antecedent question, though, as we shall see presently, the use of different principal verbs in a joint interrogatory is not permissible, and on this ground the proceedings are void.

(ii) The rule of **Acquiescence** means that the answer must express an exact agreement with the terms of the question without any addition, detraction, or variation whatever. Consider now this stipulation:

Titius: Maeui, decem dari spondes?

Sei, ex eisdem decem quinque dari
spondes?

Maevius: spondeo.

Seius: spondeo.

So far as the rule of acquiescence is concerned, this stipulation is quite unexceptionable, for each answer expresses an exact agreement with the terms of its own antecedent question,¹ though, as we shall see presently, the objective inequality between the two questions renders the whole proceedings void. The only complication arises where the two questions differ modally as regards condition or term, and a single answer is given; for example:—

Maevius: Titi, decem dari spondes?

Seius: Titi, eadem decem, si navis venerit, dari spondes?

Titius: utrique vestrum dare spondeo.

Can T.'s single answer serve as an acquiescence in both questions respectively in spite of their modal difference? Probably yes: so far as it applies to M.'s question it is to be understood as pure; so far as it applies to S.'s question it is to be understood as conditional. In such a case, however, it might be better for T. to give separate answers: "Maevi, spondeo—Sei, (si navis venerit) spondeo."

(6) **Continuus Actus.**²—All the questions and answers must comprise one continuous act. Originally, it would appear, the civil law held that the response must follow the interrogatory, and the different questions of the interrogatory and the different answers of the response must follow one another, *forthwith*. Under the mature classical jurisprudence, on the other hand, the fulfilment of the requisite of *continuus actus* depended, we believe, solely on the observance of two rules, which we call those of (i) "continuous presence," and (ii) "abstention" respectively. Provided these rules were observed

¹ Cp. *Inst.* III. 19. 5 (nam si hoc solum . . .).

² *Vide infra*, p. 103 ff.

the elapse of an interval of any length between different stages of a stipulatory act did not matter.

(i) The rule of **Continuous Presence** means that throughout the proceedings all the parties must remain constantly in one another's presence. If one of them "goes away" (*discedere*) in the middle of the proceedings, a break is caused in the continuity of act. In the case of a simplex stipulation the effect of such a break offers no difficulty; the whole proceedings are rendered void. Thus, if T. interrogates M., and the parties then separate, no matter for how short a period, the continuity of act is broken absolutely, and no answer given thereafter has any effect; if it is still desired to make a valid stipulation T. must repeat the question. The only problem is, When must a party be deemed to have "gone away"? In my opinion this point must have been regarded as one of fact to be decided by the *iudex* with reference to the circumstances of the concrete case.

The application of this rule of continuous presence to the correal stipulation may give rise to a variety of problems. For example, suppose T. interrogates M. and S. correally, and before any response is given M. goes away; even if M. returns at once, no response given by him can have any effect, because, so far as he is concerned, the continuity of act is broken. But does M.'s departure break the continuity of act so far as S. is concerned? The answer of the mature classical jurisprudence must, it is thought, be in the negative; M.'s departure merely eliminates him from the proceedings, and it is still open to S. to give an answer which will constitute a valid simplex obligation between T. and himself. This case is comparatively plain, but consider the following: T. interrogates M. and S.

correally; M. replies and then goes away before S. has done so. Here a valid obligation is created between T. and M., but what effect has M.'s departure on S.'s position? Can S. still make a valid reply? if he can, does this reply, even though given in M.'s absence, render him a correal debtor with the latter? There is just a possibility that Venuleius may have dealt with some such point in the context of the passage now figuring as D. (45. 2) 12 pr.¹

(ii) The rule of **Abstention** means that throughout the proceedings all the parties must abstain from any other business. If one of the parties does turn to other business (*ad aliud negotium accedere*), the effect is the same as if he had gone away.

(B) We now turn to the second class of formal requisites, which depend more particularly on the nature of the correal stipulation as a single joint act. The two questions are but parts of a single interrogatory, and as parts they must be consistent with the whole, and with one another. These requisites are as follows:—

(7) Though authority on the point is lacking, we may lay it down as practically certain that each question must contain the same principal verb; in other words the questions must be congruent *inter se*. Such a stipulation as—

Titius : Maeui, decem dari spondes ?

Sei, eadem decem dabis ?

Maeuius : spondeo,

Seius : dabo,

would, in our opinion, be absolutely null and void; the difference in principal verb destroys the self-consistency of the interrogatory.

¹ *Vide infra*, p. 103 ff.

(8) There must be formal equality *in toto* of prestation-object between the two questions. Here we must distinguish the cases of (a) generic, and (b) specific, prestation-object.

(a) Such a stipulation as—

Titius : Maevi, decem dari spondes ?

Sei, ex eisdem decem quinque dari spondes ? etc.

would be wholly void ; the same interrogatory cannot at the same time relate to a sum of x and also to a sum of v, even where the v mentioned in the second question are expressly stated to be part of the x mentioned in the first. Any suggestion that M. and S. are here rendered correally liable quoad v, while M. is liable as sole debtor quoad another v, must be dismissed absolutely. The nature of the correal stipulation excludes anything in the nature of "*pro tanto* correality."¹

(b) In the case of stipulations for determinate species, we cannot have equality of prestation-object without identity thereof. Accordingly our present requisite here signifies that each question must refer to one and the same determinate species. Obviously an interrogatory one question of which referred to a slave Stichus, the other to another slave Pamphilus, would lack inward consistency, and hence be void. The only point is whether a stipulation—

Titius : Maevi, Stichum servum dari spondes ?

Sei, eundem Pamphilum servum dari spondes ? etc.

would be valid, if the slave described as Stichus in the one question and as Pamphilus in the other be actually one and the same. In my opinion even this material

¹ Cp. *supra*, p. 19 ; *infra*, p. 151 f.

identity would not cure the formal defect in the interrogatory.¹

(9) There must be complete formal equality of prestation-content between the two questions. Though authority on the point is lacking, I believe we must hold that the mention of different places of payment or delivery in the questions respectively will render the proceedings void; for example—

Titius: Maevi, decem Romae dari spondes?

Sei, eadem decem Capuae dari spondes?

This same requisite excludes the possibility of the two questions prescribing different degrees of “secondary” liability. For example, such a stipulation as—

Titius: Maevi, Stichum dari spondes?

Sei, eundem Stichum dari spondes ita ut tantum dolus malus a te praestetur?

where M. incurs ordinary legal liability for culpa, but S.’s liability is expressly restricted to dolus, would in our opinion be void.

(10) Absolute equality of prestation-object and prestation-content being assumed, the interrogatory must not contain any element which prevents formal identification of the two prestations as one and the same. For example, such a stipulation as—

Titius: Maevi, decem dari spondes?

Sei, alia decem dari spondes?

would be void. Identification of the two generic prestation-objects is here expressly excluded, the purport of the formula being to produce cumulation. But cumulation and joint stipulation are incompatible;

¹ As to the converse case where two parties promise Stichus correally, but mean different slaves of that name, *vide infra*, p. 98.

two questions relating to different sums, though of equal amount, cannot possibly be united as parts of the same interrogatory.

Again, such a stipulation as—

Titius: Maevi, Stichum dari spondes ita ut culpa tantum tua, non etiam Seii, a te praestetur?

Sei, eundem Stichum dari spondes ita ut culpa tantum tua, non etiam Maevii, a te praestetur?

would in our opinion be void. Each of the questions here figured, by virtue of the limitation of responsibility to the culpa of the particular debtor alone, bears an individualistic quality which militates against the combination of both as parts of one and the same interrogatory, for it deprives the latter of inward consistency. This agrees entirely with the principle that objective identification implies extensive responsibility.

This finishes our statement of the formal constitutive requisites of the correal stipulation. A few supplementary points must now be noted.

In the first place the rule which permits the two questions of the interrogatory to differ modally as regards condition and term, calls for a brief consideration. We ask, How is such a modal difference compatible with the unity of the interrogatory? As a matter of fact, it seems quite possible that we have here a refinement of the mature classical jurisprudence which would not have commended itself to the conditores iuris antiqui. Apparently the matter was regarded in the following light: By the introduction of a condition or term an obligatory relation is rendered imperfect or immature until the condition

is fulfilled or the term arrives, but all this has no bearing on the actual thing to be rendered and the manner of rendering it—in other words, on the obligation-object. Hence, two obligations may be objectively one and the same, in spite of a modal difference of condition or term; such difference is not in the obligation-object, but merely in the obligation-content.¹ But having arrived at this result, the jurists were bound to give effect to the same by admitting the possibility of a corresponding modal difference in the two questions of a joint interrogatory, though the nature of the latter would appear *prima facie* to exclude this possibility.

In the second place we must remark on the rule that if T. interrogates M. and S. correally, and M. alone replies, or if M. and S. correally interrogate T. and T. replies to M. alone, a valid “simplex” obligation is thereby created. Here again we may doubt whether the result arrived at by the mature classical jurisprudence would have gained the approval of the ancients. The latter might quite well have argued that a joint interrogatory contemplates the creation of two obligations, and unless it fully achieves this end, it is altogether inept. And indeed Julian, who states the rule in D. (45. 2) 6,² gives a very guarded decision (*verius puto*) in the passive case (*pr.*). This hesitation was well justified, for if two parties agree to make a correal promise, the intention of each presumably is that he shall be bound together with the other or not at all. Yet the debtor who replies first, say M., has no guarantee that the other, S., will also reply, and thus he runs the chance of being left as sole debtor. The same considerations do not arise in the active case, and

¹ *Vide supra*, p. 13 f.

² *Infra*, p. 99 ff.

accordingly Julian does not here evince any hesitation (§ 2).

In the third place, if our conjectures regarding § 3 of the last quoted fragment be sound, the classical jurisprudence afforded the parties to a passive correal stipulation a simple means of excluding the possibility of one debtor being bound without the other. This means, we believe, consisted in the addition to each question of a clause fixing a period of time within which the answers must both be given, and providing that unless both debtors reply (that is, of course, validly in the affirmative) within this period, neither shall be bound; thus:—

Titius: Maevi, decem dari spondes, ita ut intra duodecimam partem unius horae tu et Seius respondeatis et nisi intra hoc tempus utriusque responsum secutum erit, neuter teneatur?

Sei, eadem decem . . . tu et Maevius . . . ?

II. MATERIAL CONSTITUTIVE REQUISITE.

According to the strict civil law, stipulation was a formal act in the narrowest sense, being devoid of material constitutive requisites, or, more correctly, having material constitutive requisites reduced to a minimum.¹ If two parties went through the appropriate verbal form under circumstances which gave it the appearance of a genuine legal act,² a stipulation was constituted,³ quite irrespective of the

¹ See following note.

² Obviously, if two persons went through the form of stipulation on the stage, no juridical act would be concluded; hence we cannot eliminate all material conditions to the existence of a legal stipulatio; at any rate, the circumstances must be such as to give the proceedings a juridical complexion.

³ Whether it will be effective depends on other considerations; *vide infra*, p. 106 ff.

existence of a real consensus between the parties. The mature classical jurisprudence, on the other hand, pronounced the material fact of consensus to be an essential element in every negotium.¹

Applying this material requisite to the case of the correal stipulation, in the first place we observe that there must be a real consensus between the single party on the one side and each of the parties on the other. If, for example, T. stipulates from M. and S. correally, and there is a real consensus between him and M., but not between him and S., the result can only be that M. is bound as sole debtor, no juridical act having taken place so far as S. is concerned. In the second place we observe that there must be a real consensus between all the parties on the one side or the other. Suppose T. stipulates correally for Stichus from M. and S., and M. means one, S. another, slave of this name, correalty is impossible, and probably the whole act should be pronounced non-existent. The "individuality" of a specific prestation-object must be determined before a joint stipulation can be thought of.

§ 15. Authorities (§ 14).

(1) D. (45. 2) 7. Florentin. VIII. inst.

Ex duobus reis promittendi alius² in diem vel sub condicione obligari potest: nec enim³ impedimento erit dies aut condicio, quo minus ab eo qui pure obligatus est petatur.

This passage, which is reproduced with two trivial

¹ See Riccobono, *La Forma della Stipulatio*, p. 4 (extract from BIDR., 31); *Dal Diritto rom. class. al Diritto mod.* in *Annali del Sem. giurid. della R. Univ. di Palermo*, III-IV., p. 313; ZSS., 43, p. 279 ff., 374 f.; Javolen. D. (44. 7) 55; Ulpian.-Peditius D. (2. 14) 1. 3. As is well known, the requirement of material consensus raises difficult problems which cannot be entered into here.

² "pure, alius" ins. *Inst.*, III. 16. 2.

³ "enim" del. *Inst.* l.c.

alterations in *Inst.* III. 16. 2, constitutes the authority for the rule that the two questions of a joint interrogatory may differ modally as regards condition or term. Florentine only mentions the case where the one question is pure, the other conditional or termal. Clearly, however, the same principle must apply where each question contains a different condition or a different term, or the one a condition and the other a term. Moreover, there is no ground for refusing to extend the principle to the active case.

The motive given in the second part of the fragment (*nec enim . . .*) is not without significance; for, Florentine says, the term or condition to which the one obligation is subject does not prevent the other pure obligation being enforced forthwith. Nothing is here said as to the anomaly of a modal difference in the two questions of one and the same interrogatory; by Florentine's time any difficulty on that score had apparently been overcome. The only point is whether two obligations correally related can be enforceable at different times; as these obligations are constructively one and the same, does not the condition or term in the one affect the other likewise, so that in result the attempt to establish a modal difference between them fails? Florentine answers this question in the negative and accordingly holds the modal difference effective.

(2) D. (45. 2) 6. Julian. LII. digest.

pr. *a.* Duos reos promittendi facturus, si utrumque interrogavero sed alter dumtaxat responderit, verius puto eum qui responderit obligari: neque enim sub condicione interrogatio in utriusque persona fit, ut ita demum obligetur si alter quoque responderit:

β. < - + > ¹.

§ 1. γ. < - + > ²

δ. duobus autem reis < - > ³ constitutis, quin liberum sit stipulatori vel ab utroque vel ab altero dumtaxat fideiussorem accipere, non dubito.

§ 2. ε. < - + > ⁴

ζ. sed si [a duobus reis stipulandi interrogatus] respondisset uni se spondere, ei soli tenetur.

§ 3. η. [Duo rei sine dubio ita *constitui* possunt, ut et temporis ratio habeatur intra quod uterque respondeat :

θ. [*modicum tamen intervallum temporis, item modicus actus qui modo contrarius obligationi non sit, nihil impedit quo minus duo rei sunt.*

ι. [fideiussor quoque interrogatus inter duorum reorum responsa si responderit, *potest* videri non impedire obligationem reorum :

κ. [*quia nec longum spatium interponitur, nec is actus qui contrarius sit obligationi.*]

This fragment, as it stands, is perplexing in the highest degree, but if my suggestions as to its restoration are in any way well founded, it assumes the utmost importance for the proper understanding

¹ (From η) *sed* duo rei sine dubio ita *interrogari* possunt, ut et temporis ratio habeatur intra quod uterque respondeat *et nisi intra tempus statutum utriusque responsum secutum fuerit, neuter teneatur.*

² (From ι) *In duobus reis promittendi constituendis si eadem stipulatione fideiussor quoque adhibeatur, non nisi pro utroque obligari potest, et post duos reos debet et interrogari et respondere : nam inter interrogationes ad duos reos factas si interrogatus fuerit vel inter duorum reorum responsa si responderit, videtur impedire obligationem eius qui postea interrogatur vel respondet :*

³ *iam*

⁴ (From ζ) *Si a duobus reis stipulandi interrogatus respondeat "spondeo," utrique teneri constat :*

of the correal stipulation and likewise of certain points regarding the accession of a fideiussor.

In the first place let us look at period η . So far as I am aware, no one has yet succeeded in giving this passage a rational interpretation. What it states is that "duo rei doubtless can be so *constituted* that a period of time is fixed (lit. consideration is had of a time) within which both shall (may) reply." The term "constitui" obscures the sense, but if we substitute "interrogari,"¹ the idea at once suggests itself that Julian may here be reproducing the framework of a stipulatory formula. Now what can the purpose be of thus fixing a period of time within which both debtors shall reply? Only this I venture to think, namely, to ensure that the one debtor shall not be bound without the other. Hence I conjecture that after "respondeat" Julian proceeded somewhat as follows: *et nisi intra tempus statutum utriusque responsum secutum fuerit, neuter teneatur*. Thus, if T. interrogates M. and S. correally, and M. replies within the time fixed, but S. does not, M. is not here bound as he otherwise would have been. In support of this conjecture it may be observed that the "et" between "ut" and "temporis" is meaningless as the period stands, but if after "respondeat" we add another "et"-clause governed by the same "ut," and assume that the two "et's" mark two correlative clauses in a formula which is here outlined, the period acquires a perfect concinnity. Thus we arrive at the special correal formula already set forth,² which gives the debtors a fixed period of time within which to

¹ The reference to a response (respondeat) without a previous mention of an interrogatory would be altogether anomalous from the classical standpoint; cp. *infra*, p. 104.

² *Supra*, p. 97.

reply, and provides that, unless both reply within this period, neither shall be bound. This restoration (which in spite of its highly conjectural character makes, as everyone must admit, uncommonly good sense) implies that period η originally followed immediately after α , and we accordingly transfer it to β .

In the second place, I believe that period ι contains the remnants of a period γ which originally preceded δ . Discussion of this conjecture I must reserve for my future treatise on Accessoriality, as it depends on certain technicalities affecting the relation of principal debtor and fideiussor.

In the third place, the initial "sed" in ζ suggests a preceding context which the Compilers have deleted. I conjecture that the antithesis may have been between a simple reply, "spondeo," given to an active correal interrogatory, and a reply expressly given to one of the co-creditors alone, *e.g.*, "Maevi, tibi dare spondeo."

In the fourth place, periods θ and κ are, without doubt, to be attributed in their entirety to the Compilers; we shall deal with them in connection with the Justinianian law.¹

Meanwhile, assuming the substantial soundness of our reconstructions, let us try and understand the procedure adopted by the Compilers with regard to this fragment. The pr. § 1 and § 2 represent three separate heads of discussion which presumably followed one another in the same order in the fifty-second book of Julian's *Digest*. In the case of each the Compilers deleted part of the original decision as obsolete, but on the other hand they sought to utilise part of the deleted matter for the purpose of setting forth their theoretical applications of the now attenuated requisite of *continuus actus*

¹ *Infra*, p. 221 ff.

to the case of the correal stipulation. To this end they added a new § 3, made up partly of elements taken from β and γ , but entirely repugnant to the classical law.

(3) D. (45. 2) 12 pr. Venuleius II. stip.

a. Si ex duobus qui [*promissuri*] $< \sim >^1$ sint, [*hodie*] $< \sim >^2$ alter, alter [*postera die*] $< \sim >^3$ responderit, Proculus⁴:- non esse duos reos ac ne obligatum quidem intellegi eum qui [*postera die*] $< \sim >^3$ responderat :

β . [cum *actor*] $< \sim >^5$ ad alia negotia $< - >^6$ discesserit, [*vel*] promissor $< - >^7$, licet [*peractis illis rebus*] $< \sim >^8$ responderit.

γ . $< - >$

By far the most troublesome of the formal requisites of the stipulation is that of continuous actus. The general principle is stated in Venuleius D. (45. 1) 137 pr., which I have ventured to restore thus :—

Continuus actus stipulantis et promittentis esse debet $[-]^9$ et $< \textit{stricta iuris ratione} >$ comminus responderi stipulanti oportet. ceterum $< \textit{hodie constat} >$, si post interrogationem $< \textit{uterque praesens manserit nec alter ad} >$ aliud $[\sim]^{10}$ $< \textit{accesserit} >$ $< \textit{negotium} >$, $[\sim]^{11}$ $< \textit{promittentem teneri} >$, quamvis $[\sim]^{12}$ $< \textit{ex intervallo} >$ *spondisset*.¹³

¹ *interrogati*

² *comminus*

³ *ex intervallo*

⁴ The MSS. reading is "prolutus," but the emendation "Proculus" is universally accepted; "ait" must be understood.

⁵ *sed hodie alio iure utimur: nam cum post aliquem ab aliquo interrogatum alter nec*

⁶ *accesserit nec ab altero*

⁷ *tenebitur*

⁸ *ex intervallo*

⁹ (*ut tamen aliquod momentum naturae intervenire possit*)

¹⁰ *acceperit* (Donellus: *occeperit*.)

¹¹ *nihil proderit*

¹² *eadem die*

¹³ ? *respondisset*

The rule of continuous presence was, I believe, stated by Ulpian in D. (45. 1) 1. 1, which I have ventured to restore thus:—

Qui praesens interrogavit, si antequam sibi responderetur discessit, inutilem efficit stipulationem, [~]¹ <quamquam> mox [-]² reverso responsum est [-].³

The first point we note in period *a* of our present pr. is the reference to a response (responderit; responderat) without a previous mention of an interrogatory. It is almost inconceivable that a classical jurist would have so expressed himself, for the interrogatory was the predominating element in every stipulatory formula; hence we must conclude that the text has been altered. The simplest mode of restoration is to substitute “interrogati” for “promissuri,” on the assumption that the Compilers have deliberately deleted an original reference to a formal interrogatory; or, if this assumption be not deemed satisfactory,⁴ we may hold that the whole phrase “ex duobus qui promissuri sint” is due to the Compilers, being introduced in order to supply the missing context. In any event it is clear that the two debtors have been interrogated correally.

In the second place period *a*, as it stands, inevitably founds an argumentum e contrario to the effect that in the case of a passive correal stipulation the requisite of continuous actus is satisfied if both debtors reply before the expiration of the day when the question is put. But we may with the utmost confidence deny that the classical jurists ever laid down such a rule. It seems very probable that

¹ *sin vero praesens interrogavit,*

² *discessit et*

³ *obligat: intervallum enim medium non vitiavit obligationem.*

⁴ *Vide infra, p. 223 f.*

Venuleius wrote "comminus" and "ex intervallo" respectively in the places now occupied by "hodie" and "postera die" (bis). So restored, period α contains a quotation from Proculus to the effect that both answers must follow immediately on the interrogatory; if either debtor makes any appreciable delay in replying, he is not bound at all.

According to my suggestion, Venuleius quoted Proculus merely to point out that the view of the latter was no longer generally accepted; the mature classical law held that the mere elapse of an interval between different steps in a stipulatory act was immaterial, provided both parties remained constantly present and neither turned to any other business. Period β as restored by me, sets forth this principle as applied to the ordinary case of a simplex stipulation.

I next conjecture that Venuleius applied the same principle to the correal stipulation in a following period γ which the Compilers have omitted. If T. interrogates M. and S. correally and M. replies at once, S. after an interval, then, if T., M., and S. remain constantly present and abstain from all other business until S. has replied, a correal obligation is duly established. So far the application of the principle is simple, but there seems a possibility that Venuleius went on to discuss certain more complicated questions which might arise in this connection. For example, if M., having given his answer, goes away before S. gives his, *quid iuris*?¹ Any further speculation on such cases would, however, be futile.

We shall again mention this pr. in connection with the Justinianian law.²

¹ Cp. *supra*, p. 91 f.

² *Infra*, p. 223 f.

§ 16. Effective Requisites of the Correal Stipulation.

In order to illustrate the effective requisites of the stipulation in general, we may cite the following cases : (*a*) a party stipulates from a pupil or a woman without the auctoritas of the promisor's tutor ; (*b*) a party stipulates for a prestation to be rendered after his own or the promisor's death ; (*c*) a party stipulates for a thing which belongs to himself. In each of these cases, assuming that all the constitutive requisites are fulfilled, it cannot be denied that a stipulatory act has been duly accomplished, yet the law holds such act ineffective to produce an obligation. Therefore, we say that in each case an effective requisite of the stipulation has not been fulfilled. The effective requisites of a stipulation are all of a purely material nature except that relating to a tutor's auctoritas, which latter had, by strict law at any rate, to be imparted in a formal manner.¹

The question now arises, If a correal stipulation is effective to bind one of the co-debtors, or to entitle one of the co-creditors, but is ineffective to bind or entitle the other, is a valid simplex obligation created? Whatever the strict civil law might have had to say on such a point, there can be no doubt that the mature classical jurisprudence gave an affirmative answer.

But further, the case of a correal stipulation may give rise to the following delicate situation : Suppose

¹ See Girard, *Man.*, p. 215. In the case of a stipulation from a pupil without his tutor's auctoritas, there is antinomy on the question whether the pupil is bound "naturally" ; see Girard, *Man.*, p. 654, *n.* 3. This question does not, however, concern us here ; without doubt the stipulation is civilly ineffective. The same question must arise in the case of a stipulation from a woman under tutory without her tutor's auctoritas.

that a correal stipulation is unimpeachable so far as its constitutive requisites are concerned ; suppose also that, if either one of the co-creditors or co-debtors be eliminated, it is effective to entitle or bind the other ; but suppose, still further, that it is not effective to establish a correal obligation. This situation may arise under two circumstances : (i) where the stipulation contains a latent defect rendering the two obligations materially unequal as a whole, and (ii) where the prestation stipulated for is materially "individualised" by the person of the particular creditor or debtor.

(i) The simplest example of the first case is where M. and S. stipulate correally : "*decem et (aut) Stichum dari*," but Stichus belongs to one of them, say M. Here if we eliminate S., a valid simplex obligation *decem dari* is established in M.'s favour, and if we eliminate M., a valid simplex obligation *decem et (aut) Stichum dari* is established in S.'s favour ; but the inequality between these two obligations clearly excludes the possibility of their identification.

We must, therefore, lay down the rule that a correal stipulation, in order to be effective for the fulfilment of its proper end, to wit, the establishment of two obligations correally related, must be free from any latent defect which renders these obligations materially unequal.

(ii) As examples of the second case the following may be cited :—

(a) M. and S. stipulate correally for the same usufruct. Now a usufruct is "individualised" by the person of the particular usufructuary,¹ so that a usufruct constituted in favour of M. is incapable

¹ *Vide infra*, p. 166, n. 2.

of identification with a usufruct constituted in favour of S. Hence, though if we eliminate S., a valid simplex obligation is established in M.'s favour and vice versa, yet it is impossible that the correal stipulation can produce two obligations correally related. The fact of the prestation being "individualised" by the person of the particular creditor excludes the possibility of identification.

(b) M. and S. stipulate correally for the same sum *dotis nomine*. As a dos is "individualised" by the person of the particular husband,¹ identification is excluded on the same ground as in the preceding case.

(c) M. and S. promise correally the same services. Here the prestation, more especially if the services are of an expert nature, is "individualised" by the person of the particular debtor, for the quality of work depends essentially on the intelligence and skill of the workman.² Accordingly, on the same ground as before, identification is excluded.

We must therefore lay down the further rule that a correal stipulation, in order to be fully effective, must not contain a prestation which, being individualised by the person of the particular creditor or debtor, renders the two (equal) obligations materially non-identified.

The question is, What result ensues if either of these effective requisites be not fulfilled—if a correal stipulation does contain a latent defect or an individualised prestation, which induces material "inequality" or "non-identification"? The strict civil law, I believe, would have had no alternative but to pronounce the stipulatory act wholly "inutilis,"³

¹ *Vide infra*, p. 166, n. 2.

² *Vide infra*, pp. 171, 176.

³ In the sense of "ineffective"; formal inequality or non-identification would render the act "inutilis" in the sense of "non-existent," there being here a failure of a constitutive requisite (*supra*, p. 93 ff.); the net result is, however, the same in each case.

but as we shall see later, there are good grounds for holding that the mature classical jurisprudence here introduced the doctrine of simple solidarity.

We reserve all further discussion of these cases of material inequality and non-identification for our chapter on "Simple and Equitable Solidarity *ex stipulatu*."¹ In the following section we shall merely consider two passages bearing on the case where one only of the two obligations, which a duly constituted correal stipulation purports to create, is materially valid.

§ 17. Authorities (§ 16).

(1) D. (45. 2) 12. 1. Venuleius II. stip.

Si a Titio < - >² [*et*] pupillo < - >³ sine tutoris auctoritate < - >⁴ stipulatus fuero eadem decem, [*vel a servo, et quasi duos reos promittendi constitui,*] obligatum [*Titium*] < ~ >⁵ solum < - + >⁶ Iulianus scribit, quamquam si servus < - >⁷ spoponderit [*in actione de peculio eadem observari debent*] < ~ >,⁸ ac si liber < - >⁹ fuisset < - >.¹⁰

It does not take much critical insight to perceive that the Compilers have here played havoc with Venuleius's text. As the notes indicate, I believe this paragraph originally referred to the relation of principal debtor and sponsor (or fidepromissor), and

¹ *Infra*, p. 147 ff.

² *post meam eiusve mortem vel a muliere*

³ *-ve*

⁴ *et a sponsore vel fidepromissore*

⁵ *esse sponsorem vel fidepromissorem*

⁶ *quasi duos reos promittendi constituissim,* ⁷ *vel peregrinus*

⁸ *dubitat an pro eo sponsor vel fidepromissor obligetur: sed verius esse putat hoc casu formulam ficticiam in dominum servi de peculio vel in peregrinum dari debere*

⁹ *vel civis*

¹⁰ *ideoque pro eo sponsorem vel fidepromissorem teneri.*

its detailed examination is therefore reserved for my future treatise on Accessoriality. Meanwhile, we merely note the clause "*quasi duos reos promittendi constituisset*" in our restoration.

Suppose I stipulate correally thus :—

Titi, post mortem meam (tuam) decem dari spondes?

Maevi, eadem decem dari spondes?

Here the stipulation from T. is *in diem* (*incertum*), that from M. is pure, but the validity of the correal stipulation is not prejudiced by this modal discrepancy. The question to T. is, however, ineffective on account of the substantive rule which forbids "*ab heredis persona incipere obligationem*."¹ But the elimination of T. does not prevent the creation of a valid simplex obligation between myself and M. Likewise, if in place of T., we have a woman or pupil who promises without the *auctoritas* of her or his tutor, my stipulation from M. is valid. It need hardly be remarked that M.'s obligation in each case is for the full *x*; the distributive interrogatory excludes any possibility of partition.

(2) D. (45. 1) 128. Paul. X. quaest.

a. Si duo rei stipulandi ita extitissent ut alter utiliter, alter inutiliter stipularetur, ei qui non habet promissorem obligatum, non recte solvitur, quia non alterius nomine ei solvitur, sed suae obligationis quae nulla est.

β. eadem ratione qui Stichum aut Pamphilum stipulatur, si in unum constiterit obligatio, quia alter stipulatoris erat, etiamsi desierit eius esse, non recte solvitur, quia utraque res ad obligationem ponitur, non ad solutionem.

¹ *Gai.* III. 100, 158.

Period β does not here¹ concern us, except in so far as it indicates that in α Paul was thinking not so much of the case where the stipulation of one of the creditors was non-existent through the failure of a constitutive requisite, as of the case where such stipulation, though existent, was ineffective to produce an obligation. More particularly he seems to have been thinking of such a stipulation as—

Maevius: Titi, Stichum dari spondes?

Seius: Titi, eundem Stichum dari spondes? etc.

where Stichus was, in point of fact, the property of, say, M. A valid simplex obligation is here created between S. and T., but M. is entirely eliminated so that solutio cannot be made to him.

The motive which Paul gives for his decision in α (quia non . . .) is instructive. Apparently some were inclined to argue that since M. and S. had been formally constituted correal creditors, M. was entitled to receive solutio in the name of S., though his own obligatory right was materially void. But Paul rejects this argument. A correal creditor is entitled to solutio in his own name alone, not in that of the other correal creditor; hence if his obligatory right is void, solutio cannot validly be made to him. The fact that such a decision was necessary seems to show that even in the late classical period the principles governing active correality were exposed to some doubt.²

§ 18. Eadem Res and Civil Consumption.

It is clearly impossible for us to attempt here any exhaustive exposition of the Roman institute

¹ But *vide infra*, p. 166, n. 1.

² Cp. *supra*, p. 22 f.; *infra*, pp. 128, 130.

of process - consumption, and we must presume that the reader is generally acquainted with its principles.

The fundamental idea is stated in *Gai.* III. 180-1; IV. 106-7, passages which open up a wide field of speculation. Confining ourselves to actions in personam, we note the rule that litiscontestation in a *iudicium legitimum* with an *intentio iuris civilis* consumes the underlying obligation absolutely, so that, if any further action is brought on the same obligation (*de eadem re, de eodem debito = de eadem obligatione*), the iudex is bound to absolve the defendant without the necessity of an exception, the obligatory relation being now extinct. On the other hand, litiscontestation in any *iudicium imperio continens* or in a *iudicium legitimum* with a formula *in factum* does not consume the obligation; hence if a further action be brought *de eadem re*, the iudex cannot absolve the defendant on the ground that, by virtue of the previous litiscontestatio, no obligatory relation now exists; if the previous litiscontestatio is to operate as a bar to a second action *de eadem re*, the insertion of an *exceptio rei iudicatae vel in iudicium deductae* in the formula of the latter action is essential.

Thus we have two modes of process-consumption admitted by the later civil law: consumption *ipso iure* and consumption *ope exceptionis rei iud. vel in iud. ded.*, otherwise called "direct" and "indirect" consumption.¹ Another way of describing the position

¹ It is altogether fallacious to describe "indirect" consumption as "praetorian," "honorary," or "equitable"; true, the same owed its origin to the activity of the praetor, but long before the mature classical period, it had been "received" into the civil law. (Cp. *infra*, p. 148, n. 2.) I would here refer the reader to the title *Grundzüge d. Prozesskonsumption* in Levy, *Konk.*, p. 48 ff. We shall discover real praetorian

is to say that in the one case there is consumed the creditor's obligatory right itself so that his action right necessarily disappears likewise,¹ whereas in the other case the consumption merely covers his action right, his obligatory right being left intact. The distinction between these two modes of consumption was, however, of a purely technical nature, and did not need to be insisted on continually in the course of juristic exposition. Hence, apparently for sake of convenience, the *exceptio rei iud. vel in iud. ded.* was regularly mentioned as the organ of process-consumption, even where there was no suggestion of the first action being other than a *iudicium legitimum* with *intentio iuris civilis*.² This manner of expression is all the more intelligible if we assume an *exceptio rei iud. vel in iud. ded.* to have been employed as a matter of common form ob maiorem cautelam even where it was, strictly speaking, "supervacua."

Now the question whether or not the defendant in one action can obtain absolution (whether *ipso iure* or *ope exceptionis rei iud. vel in iud. ded.*) on the ground of litiscontestatio in a previous action, must be decided according as the second action is or is not *de eadem re* with the first. The expression "eadem res," therefore, must have a technical significance which demands investigation. This brings us to the somewhat remarkable fact that nowhere in the sources have we any definition of this expression as applied distinctly to actions in personam. All the definitions that we have refer

process-consumption when we come to deal with equitable solidarity, *infra*, p. 192 ff. The vexed question whether there was only a single exception *rei iud. vel in iud. ded.*, or two exceptions *rei iud.* and *rei in iud. ded.* respectively does not here concern us.

¹ As to "obligatory right" and "action right," *vide supra*, p. 15.

² See, e.g., D. (44. 2) 11. 9; Levy, *Konk.*, p. 61 ff.

to actions in rem,¹ and I cannot regard as very successful Levy's attempt² to discover in these definitions the principle applicable to actions in personam also. In point of fact, as Levy himself emphasises,³ personal and real actions must pursue different courses as regards consumption. In the case of real actions consumption had its basis in the old maxim, preserved to us by Quintilian,⁴ "bis de eadem re ne sit actio," which, as Gradenwitz⁵ seems to have demonstrated, had no application to actions in personam; in the case of the latter the fundamental principle was "tollitur obligatio litis contestatione."

The absence of any clear information regarding the technical significance of "eadem res" as applied to actions in personam, may, I think, be explained as follows: "Eadem res" is here precisely equivalent to "eadem obligatio" or "idem debitum."⁶ The question, then, as to "eadem res" or "alia res" simply resolves itself into this, namely, Is the second action based on the same obligation (debt) as the first action, or on a different obligation (debt)? But this question cannot be separated from details of the formulary system which the Compilers naturally omitted as far as possible.

We have, indeed, quite sufficient information to enable us to see how the position worked out in actual practice, *Gai.* IV. 131, 131a being particularly valuable in this connection. Consider the following

¹ See, e.g., Ulpian. D. (44. 2) 7. 1, 4; Paul. eod. 12, eod. 14 pr. with Ulpian. eod. 13; Neratius eod. 27.

² *Konk.*, p. 78 ff. ³ *Konk.*, p. 51. ⁴ *Inst. Or.* vii. 6. 4; *Decl.* 266.

⁵ *Volksspruch u. Kunstregel bei d. Konsumption in Aus röm. u. bürgerl. Recht* (Festschrift f. Bekker, 1907), p. 385 ff.

⁶ Cp. *Gai.* III. 181: "ut si . . . debitum petiero, postea de eo . . . agere non possim"; IV. 107: "si . . . actum est . . . , postea . . . de eadem re agi non potest."

case: M. sells a piece of land to T. and agrees to mancipate the property on the following day and to give vacant possession a month hence; he fails to mancipate, and T. therefore sues him in an *actio empti* thus: *quod Titius de Maevio fundum quo de agitur emit, qua de re agitur, quidquid ob eam rem Maevium Titio dare facere oportet ex fide bona, eius, iudex, etc.*¹ We assume that this action is brought before the expiration of the month allowed for the delivery of vacant possession, so that all T. can recover is damages in respect of M.'s failure to mancipate. Then the month expires, and M. fails in his further duty to give vacant possession; in such case T.'s only remedy is to bring another *actio empti*. But in this second action the contract of sale which the *demonstratio* sets forth, and the claim which the *intentio incerta* asserts, are precisely the same as in the first action. Hence, there can be no doubt that this second action is *de eadem re* with the first, and is therefore excluded by the process-consumption rule. In order, however, to restrict the operation of process-consumption, the classical jurisprudence devised the plan of inserting a *praescriptio ea res agatur de fundo mancipando* in the formula of the first action, so that the way was left open for a subsequent *actio empti de vacua possessione tradenda* on the same sale, this second action being now technically *de alia re* from the first.

Again, consider Paul. D. (44. 2) 22 i.f.: "et si actum sit cum herede de dolo defuncti, deinde de dolo heredis ageretur, exceptio rei iudicatae <vel in iudicium deductae> non nocebit, quia de alia re agitur." If T. deposits an article, say a silver table, with M., and the latter dies leaving S. as his heir,

¹ Lenel, *Edict.*, p. 289.

and T. alleging that M. has been guilty of *dolus*, brings an action thus: *quod Titius apud Maevium defunctum mensam argenteam deposuit, qua de re agitur, quidquid ob eam rem Seium, heredem Maevii, dare facere oportet ex fide bona, eius, iudex, etc.*,¹ then undoubtedly the entire *obligatio depositi* is consumed and T. cannot bring a further action on the ground of *dolus* on the part of S. himself. In order to prevent this result a *praescriptio ea res agatur de dolo Maevii defuncti*, must be inserted in the formula of the first action, so that the second action *de dolo Seii heredis* becomes technically *de alia re*. Or, alternatively, the formula of the first action must be conceived in *factum*: *si paret Titium apud Maevium defunctum mensam argenteam deposuisse eamque dolo malo Maevii defuncti redditam non esse, etc.* Here again the formula has no effect in excluding a subsequent action on the ground of S.'s *dolus*, the operation of the (indirect) process-consumption being expressly restricted.²

The application of what has just been said to the correal obligation is now simplicity itself. Where two obligations are correally related, *litiscontestatio* in an action on the one consumes the other, directly or indirectly, because both obligations are *una atque obligatio* or *res*—the objects of both are *unum atque idem debitum*. The use of the term “*res*” as equivalent to “*obligatio*” is perfectly well authenticated,³ and the use of “*eadem res*” as a technical term denoting the constructive unity of two obligations for purposes of process-consumption is therefore quite natural. Hence, when we have two obligations correally

¹ *Gai.* IV. 47.

² See Levy, *Konk.*, p. 95, n. 4.

³ See, e.g., Ulpian. D. (5. 1) 18. 1 i.m.: “*si res non ex maleficio veniat, sed ex contractu.*”

related, the actions which sanction the same are properly described as "de eadem re," this description, as technically employed, being equivalent to a statement that the two actions stand to one another in a process-consumption relation.

The expression "de eadem re" was not, however, always used in the technical sense just described. Thus in Ulpian. D. (19. 1) 10: "non est novum ut duae obligationes in eiusdem persona de eadem re concurrant,"¹ the words "de eadem re" can only mean "concerning the same specific thing." Accordingly, "duae obligationes de eadem re" are "two obligations having the same determinate species as their common prestation-object," nothing being here implied as to whether their relation is correal or cumulative.²

Against one common practice of modern writers I must here enter a protest, the practice, namely, of employing the phrase "obligations de eadem re" as a technical description of two obligations correally related. According to this usage "res" signifies, not merely the prestation-object, but the prestation or obligation-object itself, and the phrase quoted signifies "obligations with one and the same prestation as their common (obligation-) object." So far as I am aware, there is no authority in the sources for this usage. It is only two actions that can properly be described as "de eadem re" in the technical sense of the process-consumption rule. The phrase "in utraque obligatione una res vertitur" will be explained

¹ I must maintain the genuineness of this clause as against Levy, *Konk.*, p. 457.

² Another untechnical use of "de eadem (ea) re" is found in Ulpian D. (44. 2) 5, which in its original form referred to vadimonium: here the phrase in question simply means "on the same material ground of action"; see Levy, *Konk.*, p. 101 ff.

in our discussion of *Inst.* III. 16. 1 in the next section.¹

Thus we attain a full comprehension of correality as a relation founded on the entirely artificial and formal basis of process-consumption. The very formality and artificiality of this basis proves it, we may venture to say, with absolute certainty to have been the root out of which the whole institute of correality originally sprung. The correal stipulation must have been deliberately devised by the *conditores iuris antiqui* for the purpose of establishing a constructive unity of obligation which would allow process-consumption to operate extensively. Had the early Roman law been able to devise an institute of solidarity based essentially on *solutio*-consumption, the extensive consuming effect of *litiscontestatio* would be an anomaly which could not be explained. If, however, we assume the institute of correality, as we find it portrayed in the writings of the classical jurists, to have been evolved from a manipulation of the stipulatory formula, resorted to with the express design of employing the principle of process-consumption for solidary ends, the whole position becomes plain.

Naturally after they had succeeded in constructing a correal relation in which *litiscontestatio* had an extensive consuming effect, the early jurists were bound to attribute a like effect to *acceptilatio*, which latter we assume to have been originally indispensable to the discharge of an obligatory relation *ex stipulatu* without action.² Then when the material fact of *solutio* became endowed *per se* with the capacity of extinguishing such a relation, the jurists were bound to attribute extensive consuming effect to it also. Thus in the classical law, *acceptilatio* and *solutio*

¹ *Infra*, p. 124 ff.

² See Girard, *Man.*, p. 724 ff.

stand side by side with *litiscontestatio* as agents in consuming a correal obligation—each of them has an equal power of effecting a civil consumption. But as Levy¹ has very clearly shown, in the writings of the classical jurists it is round process-consumption, not *solutio-* (or *acceptilatio-*) consumption that the institute of correalty revolves. If two obligations, as originally constituted, have different subjects on the one side or the other, and we ask whether or not they are correally related, the formal test is, Does *litiscontestatio* under the one consume the other or does it not?

On the other hand, however, it cannot be denied that by the days of the mature classical jurisprudence extensive process-consumption had long outlived its usefulness; as the institute of simple solidarity proves,² the law was now perfectly capable of establishing solidary relations on the natural and material basis of *solutio-consumption*. Yet so deep had the idea of extensive process-consumption its roots in the legal system of Rome, that it maintained itself in full vigour throughout the whole classical period.

The obvious inconvenience of extensive process-consumption in the passive case—in the active case it was practically harmless³—lay in the fact that if the debtor sued turned out to be insolvent, the creditor had no recourse against the other. It was therefore necessary for the creditor in his own interests to make careful enquiry into the solvency

¹ *Konk.*, p. 182 ff.; I must not, however, be held as concurring with the whole of Levy's arguments.

² Assuming, of course, our views regarding this institute to be sound.

³ It could work harmfully only in the rare case where one of the co-creditors joined issue in collusion with the debtor or at all events without a serious intention of prosecuting the action; *vide infra*, p. 123.

of the debtors before bringing his action, and it might often be advisable for him to split up his claim between them.

But, we ask, had the mature classical jurisprudence really failed to devise any means of protecting creditors against the hardship of extensive process-consumption? We at once think of the praetor's power of granting *restitutio in integrum*,¹ but this remedy was of an extraordinary nature, and, we may be almost certain, was only applied where the creditor was a minor or had been the victim of fraud, or in certain other recognised cases of a special description. Then it was always possible for the creditor to avoid taking his co-debtors bound correally, and in lieu thereof to take one of them bound as sole principal debtor and the other as a mandator,² independent guarantor,³ or the like. But leaving such devices aside, we ask, Was there no means of preserving the correal relation intact and yet enabling the creditor, after suing the one debtor, to have recourse against the other? If my conjectures regarding Papinian. D. (45. 2) 11 pr.⁴ be well founded, the classical jurists had discovered such a means in the process of *mutua fideiussio*. After taking the co-debtors bound correally, the creditor could, by taking them bound in addition as fideiussors for one another, practically avoid any risk arising from the extensive consuming effect of *litiscontestatio*.

One means of excluding extensive process-consumption mentioned by Justinian in C. (8. 40 (41)) 28 cannot, in my opinion, have been available in classical

¹ Cp. Paul.-Proculus D. (15. 1) 47. 3, "*resciso superiore iudicio*"; Levy, *Konk.*, p. 261 ff.

² *Vide infra*, pp. 157, 183 f.

³ *Vide infra*, pp. 154 ff., 176 ff.

⁴ *Vide infra*, p. 135 ff.

times, namely, a special pact providing for such exclusion. Extensive process-consumption was a civil law consequence, and I hold it quite impossible for this consequence to be avoided by a simple agreement of parties. On this point we shall have more to say when we come to deal with the Justinianian law.¹

The concluding point with which we shall deal in this section is the relation between process-consumption on the one hand and election and occupation on the other.² The all-important fact is that the terms "eligere" and "occupare" have essentially a substantive, not a processual, significance; the statements that the creditor "elects" one of his correal debtors—that one of the correal creditors "occupies"—have in themselves nothing to do with *litiscontestatio* or process-consumption. "Election," as an accomplished fact, properly means nothing more than that the creditor has evinced an intention to proceed against a particular one of his correal debtors for the whole debt, and pass the others by; "occupation," as an accomplished fact, properly means nothing more than that one of the correal creditors has anticipated the others in taking some step which, on the principle, "*melior est condicio occupantis*," gives him a preferential right to the whole debt. The statement that the creditor in a passive correal obligation has an "election" simply means that he has a power of proceeding against any one debtor for the whole debt at his free choice; the statement that any one creditor in an active correal obligation is in a position to "occupy" simply means that he has the power of taking some step which, unless he

¹ *Infra*, p. 225 ff.

² On this matter I would refer the reader to the excellent remarks of Levy, *Konk.*, p. 28 ff., 377.

has already been anticipated by a co-creditor, will secure to him a preferential right to the whole debt.

An election is, however, inchoate until it has been perfected by *litiscontestatio* with the debtor elected; the whole point of electing at all is the anticipation of joining issue,¹ and once issue is joined the other debtors are freed. Hence we find passages in which the classical jurists use such terminology as "election of one debtor frees the other"; see, for example, Paul. D. (9. 4) 24; 26 pr.: "in quo casu electio est actoris cum quo velit agere . . . electio vero alterum liberabit." In such cases, however, the context makes it clear that not election per se, but election perfected by *litiscontestatio* is the liberatory agent.

On the other hand, we must avoid the error of supposing that the classical jurists ever used "electio" as a technical processual term signifying *litiscontestatio*. Certainly in the example last quoted one might at first sight think it permissible to translate "electio vero alterum liberabit" by "but *litiscontestatio* with the one will free the other." This translation would, however, be strictly inaccurate. The "in quo casu electio est actoris cum quo velit agere" clause shows "electio" in its proper sense of a substantive right on the creditor's part of electing which debtor he will sue, and "electio" in the following clause must still bear the same substantive meaning; only we must now understand that the right of election has been duly exercised and perfected by *litiscontestatio*. The use of "electio" where "*litiscontestatio*" would be more exact, belongs however more especially to the Justinianian law,² in which substantive ideas and terms had largely superseded those of a processual order.

¹ Cp. Heumann-Seckel, p. 167, s.v. *eligere*, a), β).

² Cp. Levy, *Konk.*, p. 45, n. 5; *vide infra*, p. 227, n. 2.

Likewise in the active case, when it is said that one of two correal creditors has "occupied," we naturally think of *litiscontestatio* as the means by which this occupation has been achieved. There is, however, no necessary connection between occupation and *litiscontestatio*. In certain non-correal relations where there is a conflict of material claims, the "occupant" is not the claimant who first joins issue, but he who first obtains judgment.¹ But even where it is stated that one of two creditors occupies by *litiscontestatio*,² this statement does not per se connote legal extensive process-consumption. Such occupation may simply mean that we accord the creditor who first joins issue, say M., a preferential claim to the prestation, without, however, the right of the other creditor being legally extinguished. And in point of fact, this is precisely what the praetor does when, in reducing a legal cumulative relation to one of equitable solidarity, he admits an "equitable extensive process-consumption"³; the other creditor, S., retains his right at law, but the praetor refuses him an action. In such a case, it is worth while observing, if M. joins issue in collusion with the debtor merely in order to exclude S., or in any event if he fails to prosecute the action duly, there is no reason why he should not be deprived of his preference, and S. allowed to sue. On the other hand, when extensive process-consumption operates at law, the right of S. is absolutely extinguished under all circumstances, and can only be resuscitated by a praetorian grant of *restitutio in integrum*.

¹ Cp., for example, Gaius D. (15. 1) 10; Ulpian. D. (9. 4) 14 pr. i.f.; Levy, *Konk.*, p. 377, n. 6.

² Cp. D. (32) 11, 21 i.f., "qui occupat agendo."

³ *Vide infra*, p. 192 ff.; and as to simple solidarity p. 164, n. 1.

§ 19. Authorities (§ 18).

(1) *Inst.* III. 16. 1.

α. Ex huiusmodi obligationibus et stipulantibus
solidum singulis debetur et promittentes
singuli in solidum tenentur :

β. in utraque tamen obligatione una res vertitur :

γ. < - >

δ. et vel alter debitum accipiendo vel alter
solvendo omnium peremit obligationem et
omnes liberat.

In the pr. of this title, as we have already seen,¹ the proper form for concluding a correal stipulation is given. In the present paragraph the matter is looked at from the opposite standpoint ; a correal stipulation is deemed to be concluded in the form prescribed, and the effects of such stipulation are now laid down. In all probability the original of the entire title III. 16 is Florentine's *Institutes*,² and we must keep before us the elementary nature of the latter work in construing this paragraph.

In period α the term "obligationibus" is equivalent to "stipulationibus," and the phrase "ex huiusmodi obligationibus" means "from the two stipulations 'Maevi, quinque dari spondes? spondeo' and 'Sei, eadem quinque dari spondes? spondeo' (and similarly in the active case)," these two stipulations being run together so as to form a single joint stipulation in distributive form. Period α therefore signifies that the joint stipulation by virtue of its distributive form renders each co-creditor or co-debtor entitled or bound in respect of a full sum of v and not merely pro rata.

¹ *Supra*, p. 65 ff.

² For we know § 2 (= D. (45. 2) 7) to have been taken from this work.

Period β then goes on to say that though each of the two obligations (stipulations) has as its prestation-object a full sum of v , yet the two sums are one and the same. The phrase “una res” seems to connote simply the identification of the two prestation-objects, and the form of expression here adopted for the purpose of expounding the correal relation is perfectly justifiable, so long as we are not referring to the case of a stipulation for a determinate species. As we have seen,¹ where two obligations have equal generic prestation-objects, and these prestation-objects are identified as one and the same, this identification (equality of prestation-content being assumed) produces identification of the two prestations, in other words it produces an objective identity between the two obligations. If, however, the common prestation-object of the two obligations were specific, *e.g.*, the same slave Stichus, the statement “in utraque obligatione una res vertitur” (where the “una res” is Stichus) would not suffice to express the existence of a correal relation between the two obligations; for any number of quite independent obligations may have the same determinate species as their prestation-object—may be “de eadem re” in the untechnical sense.²

The foregoing remarks proceed on the understanding of the “res” in period β as merely the prestation-object, not the prestation (obligation-object) itself, and this interpretation I believe to be in harmony with the terminological usage of the classical jurists.³ Period β must therefore be considered merely as an elementary indication of the objective unity involved in the correal relation, and not as a fundamental exposition thereof; such an

¹ *Supra*, p. 78.

² *Vide supra*, p. 117.

³ *Vide supra*, l.c.

exposition would have to take into account the case where the prestation-object is a determinate species.

Period δ sets forth the rule of solutio-consumption, and there is nothing to indicate that it is not substantially of good classical origin.¹ On the other hand, it is almost incredible that Florentine omitted all reference to process-consumption, and we may therefore conjecture with fair certainty that the Compilers have deleted a passage dealing with this matter. In point of fact one can hardly fail to perceive that the sequence of β and δ is defective. The operation of consumption is clearly meant to be a deduction from “una res vertitur,” and accordingly we miss some such word as “ideo”; again, the change from “una res” to “debitum” is abrupt. If, however, we interpose a period γ running somewhat as follows: “*et ideo si haec res in iudicium deducta est,*² *postea peti non potest,*” and assume period δ to have commenced with “*et similiter*” or the like, the abruptness is lessened and all serious difficulty removed.

(2) D. (45. 2) 3. 1. Ulpian. XLVII. ad Sabin.

a. Ubi [*duo rei facti*] $< \sim >$ ³ sunt, $< - >$ ⁴ potest vel ab uno eorum solidum peti :

β . [*hoc est enim duorum reorum*] $< \sim >$ ⁵ ut unusquisque eorum in solidum sit obligatus, [*possitque ab alterutro peti*] $< \sim >$ ⁶ :

γ . [*et*] $< \sim >$ ⁷ partes autem a singulis [*peti*

¹ The correlation of “alter” and “omnes (omnium)” cannot be treated as a serious objection.

² It will be observed that according to this restoration the “res” which is “in iudicium deducta” is merely the prestation-object, whereas properly it should be the obligation itself; such terminology is, however, accurate enough for practical purposes.

³ *plures sponsores vel fidepromissores in provincia accepti*

⁴ *iure civili*

⁵ *cum enim lex Furia tantum in Italia locum habeat, evenit*

⁶ *proinde ac si fideiussores essent* ⁷ *an*

posse nequaquam dubium est] $< \sim >$ ¹, quemadmodum [*et*] a [*reo et fideiussore*] $< \sim >$ ² petere [*possumus*] $< \sim >$ ³ $< - >$ ⁴:

δ. $< - >$ ⁵

ε. utique enim cum una sit obligatio $< - >$,⁶
una et summa est $< - >$ ⁷,

ζ. ut si [*ve unus solvat, omnes liberantur,*] $< \sim >$ ⁸
[*sive solvatur, ab altero*] liberatio contingat.

The inconcinnity and triviality of this paragraph as it stands must be apparent to everyone. In particular no one has yet succeeded, and I do not believe ever will succeed, in giving the words of period ε a rational interpretation in their present context. Again, the reference in ζ to solutio-consumption, where a classical jurist would certainly have mentioned process-consumption, must be due to the Compilers. In my opinion, however, Ulpian in this paragraph dealt, not with the relation of duo rei at all, but with that of provincial sponsors or fidepromissors,⁹ the opening words “ubi duo rei facti sunt” having been substituted for “ubi plures sponsores vel fidepromissores in provinia accepti sunt.” On this view periods ε and ζ must mean that, since the different sponsory or fidepromissory obligations are accessory to one and the same principal obligation, the sums due by the different sponsors or fidepromissors are one and the same

¹ petere, dummodo solvendo sint, ex epistula divi Hadriani sit compellendus creditor

² pluribus fideiussoribus ³ compellimur, ⁴ dubitatum est

⁵ et placuit compelli: nec refert utrum simul accepti sint an separatim:

⁶ principalis ⁷ quam omnes sponsores vel fidepromissores debent

⁸ lis cum uno contestetur, omnibus

⁹ Cp. *Gai.* III. 121 ff.; *Strasbourg Frag.* (*fragmenta Argentoratensia*) of Ulpian's *Disputat.*, B 11a. (3).

sum, so that extensive process-consumption operates. I conjecture that this argument served as a motive for a preceding decision that provincial sponsors or fidepromissors have a beneficium divisionis whether they were taken bound together or separately. The condition precedent to a grant of beneficium divisionis is the existence of an accessory¹ correal relation, and periods ϵ and ζ , as restored, state the fulfilment of this condition. Further discussion of the paragraph must, however, be reserved for my study on Accessoriality.

(3) D. (45. 2) 16. Gaius III. de verb. obligat.

Ex duobus reis stipulandi si semel unus egerit,
alteri promissor offerendo pecuniam nihil
agit.

At first sight this fragment seems utterly trivial; if litiscontestation by one of the correal creditors, say M., has consumed the obligatory right of the other, S., how can the debtor possibly make an effective offer of payment to S.? Probably, however, the view which Gaius here refutes was that, as M. and S. had originally been constituted correal creditors, S. remained entitled to receive payment in the name of M., even after his own obligatory right had been extinguished through M.'s litiscontestation. Thus, there is a close analogy between Gaius's decision in this fragment and that of Paul in D. (45. 1) 128 (a).² Both passages show us that the principles governing active solidarity were exposed to some doubt even in the mature classical period. The passage next to be considered places this doubt in a still stronger light.

¹ Material accessory will however suffice; *vide supra*, p. 34, n. 1; *infra*, p. 322 f.

² *Supra*, p. 110 f.

(4) D. (46. 2) 31. 1. Venuleius III. stip.

a. Si duo rei stipulandi sint, an alter ius novandi habeat, quaeritur, et quid iuris unusquisque sibi adquisierit.¹

β. fere autem convenit et uni recte solvi et unum iudicium² petentem totam rem in litem deducere, item unius acceptilatione peremi utrisque³ obligationem :

γ.⁴ ex quibus colligitur unumquemque perinde sibi adquisisse ac si solus stipulatus esset, excepto eo quod etiam facto eius cum quo commune ius stipulantis est, amittere debitorem potest.

δ. secundum quae si unus ab aliquo⁵ stipuletur, novatione quoque [*liberare eum ab altero poterit, cum id specialiter agit*] < ~ + >,⁶ eo magis cum eam stipulationem similem esse solutioni existimemus :

ε. alioquin quid dicemus, si unus delegaverit creditori suo communem debitorem isque ab eo stipulatus fuerit? aut mulier fundum⁷ iusserit doti [*promittere*] < ~ >⁸ viro, vel nuptura ipsi doti eum⁹ [*promiserit*] < ~ >¹⁰?

ζ. [*nam debitor ab utroque liberabitur.*]

¹ I must maintain the genuineness of the clause "et quid . . . adquisierit" as against Beseler II., p. 56, whom Levy, *Konk.*, p. 380, follows.

² iudicio : Lenel, *Pal.* II., col. 1220.

³ utriusque : Beseler, l.c.

⁴ I must maintain the genuineness of period γ as against Beseler, l.c.

⁵ alio quo : Baron, *Gesamtrechtsverhältnisse*, p. 320 ; see Binder, p. 216, n. 19.

⁶ (From ζ) debitor ab utroque liberabitur

⁷ ? eundem (sc. communem debitorem) : Huschke, *Lindes Zeitschr.*, new series, II., p. 153 f. ; see Binder, l.c.

⁸ dicere ⁹ ? eidem (sc. communi debitori). (*debitum* : Huschke, l.c.)

¹⁰ dixerit

The special question raised in this paragraph, namely, whether one correal creditor has the power of excluding the other by novation, must be reserved for a monograph on Novation. As regards periods δ and ζ , the Compilers seem to have transferred the words "debitor ab utroque liberabitur" to the end of the paragraph, and substituted a clause of their own.¹ In the conclusion of ϵ , a reference to dotis promissio has evidently been substituted for a reference to dotis dictio, and the remaining text has got somewhat corrupted.

In the present work, however, we are concerned mainly with the general observations in periods β and γ . Period β affords a striking confirmation of our thesis as to the comparatively late development of active correality.² A jurist writing about the age of Antoninus Pius can only say "fere convenit" that solutio, litiscontestatio, and acceptilatio have extensive consuming effect! Does not this tend to prove that, even in the mature classical period, there existed a school of jurists who denied the possibility of active correality, holding that an active joint stipulation, even if framed distributively, could only produce partition?³

Period γ is important as giving an exposition of the precise relation of correal creditors. Each of the latter occupies the position of a sole creditor, except that he is liable to be deprived of his obligatory right by the act of his co-creditor. Here it is the natural independence of the two obligations, rather than their constructive unity, that receives emphasis.

¹ Period δ as it stands shows the new law of novation; cp. *infra*, p. 221.

² *Vide supra*, pp. 22 f., 111, 128.

³ Assuming, of course, that the intentions of parties were not to establish a relation of principal creditor and adstipulator.

(5) D. (46. 4) 13. 12. Ulpian. L. ad Sabin.

a. Ex pluribus reis stipulandi si unus acceptum fecerit, liberatio contingit in solidum.

D. eod. 16 pr. Idem VII. disput.

β. Si ex pluribus obligatis uni accepto feratur, non ipse solus liberatur, sed et hi qui secum obligantur :

γ. nam cum ex duobus pluribusque eiusdem obligationis participibus uni accepto feratur, ceteri quoque liberantur,

δ. non quoniam ipsis accepto latum est, sed quoniam velut solvisse videtur is qui acceptilatione solutus est.

A full discussion of the bearing of acceptilatio on the correal relation must be reserved for a special treatise on Acceptilatio; here we simply quote the above passages as stating acceptilatio-consumption. In the passive case, it will be observed, Ulpian gives acceptilatio an extensive consuming effect on the express ground that it is deemed formally equivalent to solutio. This might be accurate enough for the practical purposes of the classical law, but it cannot be described as historically sound. Almost certainly acceptilatio preceded solutio as a means of discharging obligations ex stipulatu without action. It will further be observed that periods *β* and *γ* are tautological, and on that account fr. 16 pr. can hardly be attributed to Ulpian in its present form; probably the Compilers have deleted something after *β*. With the words "eiusdem obligationis participibus," Julian. D. (46. 3) 34. 6 "particeps et quasi socia obligationis" may be compared.

(6) D. (46. 1) 5. Ulpian. XLVI. ad Sabin.

α. Generaliter Iulianus ait eum qui heres exstitit ei pro quo intervenerat, liberari ex causa accessionis et solummodo quasi heredem rei teneri. denique scripsit, si fideiussor heres exstiterit ei pro quo fideiussit, quasi reum esse obligatum, ex causa fideiussionis liberari: reum vero reo succedentem ex duabus causis esse obligatum, < - >¹

β. < - + >².

γ. [*nec enim . . . duas obligationes sustinet.*]

δ. item si reus stipulandi exstiterit heres rei stipulandi, duas species obligationis sustinebit: plane si ex altera earum egerit, < - >³ utramque consumet:

ε. [*videlicet* quia natura obligationum duarum *quas haberet* ea esset ut, cum altera earum in iudicium deduceretur, altera consumeretur].

This fragment deals with confusio and has the same basis as Venuleius D. (45. 2) 13; here we can only discuss it in so far as it bears on the subject of process-consumption.⁴

In my opinion the final period ε has been transposed from its original position, namely β, where it referred to the passive, not to the active relation.

¹ *sed si ex altera conventus sit, ex altera conveniri non posse,*

² (From ε) quia natura obligationum duarum, *cum initio in diversis reis constitissent*, ea esset ut, cum altera earum in iudicium deduceretur, altera consumeretur.

³ *eadem ratione*

⁴ There is undoubtedly a close connection between this fragment and D. (19. 1) 10; see Levy, *Konk.*, p. 456 ff., with whose views, however, I cannot altogether agree; cp. *supra*, p. 117, n. 1. In my opinion period γ is insititious; how far it consists of classical elements taken from another context cannot be discussed here; D. (45. 2) 13 contains part of this period in a somewhat debased form.

In the first place, if we ignore the difficulty caused by the imperfect subjunctives “*esset*”¹ and “*haberet*,” and give both of them the force of present tenses, then, taking δ and ϵ together we have the following glaring *petitio principii*: If the creditor sues on one of the two obligations, he consumes both, because their nature is that an action on the one consumes the other! In the second place, how are the two imperfect subjunctives to be justified? It may be said that “*esset*” refers to the time of the original constitution of the obligations: “the nature of the two obligations when they were originally constituted was such that. . . .” This interpretation gets over the *petitio principii*, but it is hardly possible on grammatical grounds; moreover, if such was Ulpian’s meaning, why did he not express the same clearly? In any event, however, “*haberet*” is impossible, the reference being to the present time. In the third place we note the inelegant change from “*duae* (*duas*) *species obligationis*” in δ to “*duae obligationes* (*obligationum duarum*)” in ϵ . In the fourth place “*videlicet*” is a favourite word of the Compilers, being frequently employed by them to tack on one passage to another.²

All difficulty disappears if my restorations of the conclusion of period α and period β are adopted. The tenses in β are accounted for by the *oratio obliqua*, and the passage makes excellent sense. The two obligations, as originally constituted, say, between T. and M. and between T. and S., stood in a process-consumption relation, and in this relation they continue, though by devolution they become united in

¹ “*deduceretur*” and “*consumeretur*,” of course, depend on “*esset*.”

² The classical jurists prefer “*scilicet*”; Heumann-Seckel, p. 623, s.v. *videlicet*.

the person of a single debtor. With our present fragment, as so restored, we may compare Julian. D. (44. 7) 18,¹ where the facts and decision are as follows:—M. is entitled to slave Stichus ex stipulatu, and S. is entitled to the same slave ex testamento, so that their rights are plainly cumulative; though M. succeeds as heir to S. (or vice versâ), the same cumulative relation subsists, litiscontestation under the one obligation having no effect on the other. The motive is as follows: “quia initio ita constiterint hae duae obligationes ut, altera in iudicium deducta, altera nihilominus integra remaneret.”

In my view, then, the Compilers have, as regards β and ϵ , followed their not infrequent course of cutting out a passage from the middle of a text and transferring it, amended as required, to the end thereof. Their reason for here adopting this course is plain. In their time extensive process-consumption had been abolished in the passive case, but was maintained, to outward appearance at least,² in the active case; hence they transferred Julian's motive (quia . . .) from the former case to the latter, and in so doing substituted the impossible “quas haberet” for “cum initio in diversis reis constitissent,” or the like.

Our present fragment, as restored and considered in conjunction with D. (44. 7) 18 (cit.), is important as showing how Julian considered the correal relation. The two obligations are recognised as distinct, only they stand related in a particular way—they have in their relation to one another a particular “natura,”³ that is to say, litiscontestation under the one consumes the other. It does not, of course, follow that Julian rejected the idea of unity of obligation; in D.

¹ See as to this fragment, Levy, *Konk.*, p. 453 ff.

² *Vide infra*, p. 229 ff.

³ Cp. D. (45. 2) 9. 1 (§) *infra*, p. 265.

(46. 3) 34. 1, he speaks of an “obligatio communis,” and his recognition of the diversity of obligation in the present connection may be attributed to the special subject-matter under discussion, namely, confusio. The inference is, however, plain that to his mind the unity of obligation was simply a piece of juridical construction—that “eadem (una) obligatio” meant nothing more than “duae obligationes quarum natura est ut cum altera earum in iudicium deducatur altera consumatur.” Again, nothing is said of solutio-consumption; it is on process-consumption that the correal relation essentially depends.

(7) D. (45. 2) 11 pr. Papinian. XI. respons.

α. Reos promittendi vice mutua fideiussores non inutiliter accipi convenit :

β. $< - >^1$

γ. reus [itaque] $< \sim >^2$ stipulandi actionem suam dividere si velit (neque enim dividere cogendus est) poterit eundem ut principalem reum, *item*³ qui fideiussor pro altero exstitit, in partes convenire, non secus ac si duos promittendi reos divisim actionibus conveniret.

This is one of the texts of the Digest which merit the title of “famous,” and if one were to attempt to discuss at length all the various opinions which have been expressed regarding it, a separate volume would almost be required.⁴

¹ *nam si alter, ut is qui fideiussor pro altero exstitit, condemnatus erit, alterum, qui a reo stipulandi litis contestatione liberatus est, mandati actione obligatum habebit; itaque si iudicatum non faciat, hanc actionem cedere reo stipulandi per praectorem compelletur, vel actio utilis mandati in alterum dabitur;* ² *autem*

³ ? *et ut eum.* Savigny, *Obligationenr.* I., p. 268, n. (a) suggests: *item tamquam eum.*

⁴ The curious reader may consult (inter alia) the following :—Savigny, *Obligationenr.*, I., p. 268 ff.; Brinz, *Krit. Blätt.* IV., p. 36 ff.; Vangerow,

To begin with, nothing will persuade me that Papinian was here dealing with any case other than that where two parties were first taken bound as principal correal debtors and then as fideiussors for one another, thus :—

Titius : Maevi, decem dari spondes ?

Sei, eadem decem dari spondes ?

Maevius : spondeo.

Seius : spondeo.

Titius : Maevi, eadem decem pro Seio fide tua esse iubes ?

Maevius : fide mea esse iubeo.

Titius : Sei, eadem decem pro Maevio fide tua esse iubes ?

Seius : fide mea esse iubeo.

Any suggestion that we have here to do with the Greek institute of ἀλληλεγγύη, or something analogous thereto—that there is a connection between Papinian's rei promittendi vice mutua fideiussores and the ἀλλήλων ὑπεύθυνοι of Novel 99¹—must in my opinion be rejected absolutely.

Now in *a* Papinian says, “It is agreed that the taking of correal debtors bound as mutual fideiussors is not without its utility.” Wherein consisted the utility of this practice? So far as I can see, only one answer is reasonably possible, namely, that the creditor thereby escaped the perils of extensive process-consumption. How this was accomplished is easy to understand. The creditor T. sues one of the co-debtors, say M., not as principal debtor but

Pand., III., p. 83 ff. (§ 573); Mitteis, *Individualisierung d. Obligat.*, p. 69 ff., *Reichsr. u. Volksr.*, p. 183; Binder, p. 301 ff.; Bortolucci, *BIDR.*, 17, p. 309 ff.; Collinet, *Études Hist. sur le Droit de Justinien*, I., p. 131 ff.

¹ *Vide infra*, p. 236 ff.

as surety for the other, S. ; M., being condemned in the name of S., has an *actio mandati* against the latter¹; if M. satisfies the judgment in T.'s favour, good and well; if he does not, the praetor can put pressure on him to assign his *actio mandati* to T., who can then, by means of this ceded action, sue S. for the unrecovered balance; or again, if M. contumaciously refuses to make the assignment or absconds, the praetor will clearly be justified in granting T. an *actio mandati utilis* against S., based on the fiction that the assignment has actually been made.

But how does all this agree with period γ ? This period reads as follows: "*Therefore* if the creditor wishes to divide his action (for he cannot be compelled to do so), he will be able to sue the same individual debtor (say M.) partly as principal debtor and partly as fideiussor for the other (S.), just as if he were to sue the two debtors separately, each for a share of the debt." Apart from the introductory "*itaque*," this period makes perfect sense.² The debt being, say, x, T. may, if he pleases, sue M. for, say, vi as principal debtor, and for the remaining iv as fideiussor on S.'s behalf, in which case the position will be the same as if he were to sue M. for vi and S. for iv separately. The parenthetical clause "*neque enim dividere cogendus est*" has caused difficulty to some, but it is capable of a perfectly reasonable interpretation. M. and S. are sureties for one and the same debt; are they not, therefore, entitled to a *beneficium divisionis*? No; the *beneficium divisionis* only applies to co-sureties

¹ The circumstances of the *mutua fideiussio* clearly imply that each has given the other a mandate to become fideiussor for him.

² There is a striking similarity between the language of Papinian. D. (46. 1) 51. 2 and that of our present period γ .

for a third party, not to correal debtors who become sureties for one another. Again, the words “**duos** promittendi reos,” as contrasted with the “reos promittendi” in *a*, have proved a stumbling-block. All difficulty is, however, removed if we observe that “**duos**” here means “the two,” “both.” Throughout the response Papinian uses “reos promittendi” (without any prefix “**duos**,” “plures,” “**duos pluresve**”) in the sense of “correal debtors,” the facts of the case doubtless making it plain that none other than a correal relation is intended. Moreover, in γ he does not say “**duos reos** promittendi,” which is the invariable sequence when “**duos**” is a technical prefix denoting correality, but “**duos** promittendi reos,” and it may be that he chose this latter sequence deliberately, to avoid the possibility of “**duos**” being construed as a technical prefix.

On the other hand, however, it seems impossible that the Compilers have preserved the whole of Papinian's argument. Period γ purports to be a deduction from *a*; the special advantage which the creditor obtains by the *mutua fideiussio*, apparently is that he can divide his action by suing one of the co-debtors partly as principal and partly as fideiussor for the other. But if the foregoing exposition be sound, the creditor's power of dividing his action is a matter of small significance; the substantial benefit which he derives from the *mutua fideiussio* is a power of suing either co-debtor for the *whole* as surety on the other's behalf. Hence I am driven to the conclusion that in Papinian's original text, period γ did not follow immediately on *a*. This view is slightly supported by two considerations:—

(*a*) “*Itaque*” standing second in its clause, though by no means impossible in classical law Latin, is some-

what suspicious¹; moreover, if period γ had followed immediately on α , an explanatory particle such as "nam" would have been more appropriate.

(*b*) In α the verb "convenire" is used in the sense of "to be agreed," while in γ it is used (*bis*) in the sense of "to sue"; but it is hardly likely that Papinian would employ the same verb in two different senses in such close proximity.

Accordingly I have ventured to insert a period β , and to substitute "autem" for "itaque" in γ . If Papinian wrote such a passage as β , the Compilers would naturally delete the same owing to the reference to process-consumption; under the Justinian law, the creditor was able to sue both correal creditors one after the other, so that the substantial benefit formerly arising from *mutua fideiussio* was now afforded in every case. Moreover, with the deletion of β , the "autem," introducing (as we suppose) period γ , lost its force, and it was quite natural that the Compilers should substitute another particle; perhaps they took the "itaque" from the concluding sentence of β .

But now a further point arises: Why should the creditor wish to divide his action when it was more to his advantage to sue one of the co-debtors for the whole as surety on the other's behalf? If T. sues M. for VI as principal debtor and for IV as fideiussor on S.'s behalf, as regards the VI he loses all faculty of regress against S., should M. fail to pay. It may be suggested that Papinian was here dealing with a point of more or less academic interest, but such an explanation is hardly satisfactory. Perhaps there may be something in Mitteis's² conjecture that in

¹ See Beseler, III., p. 105 ff.

² *Individualisierung*, p. 69 ff.; *Reichsr. u. Volksr.*, p. 183 f.; *contra*, Binder, p. 302 ff.

the concrete case submitted for decision T. was endeavouring to evade the *exceptio litis dividuae*.¹ Suppose T. and M. are resident in the same place, but S. is resident elsewhere; T. at present only wishes to exact VI of the x due, and he therefore sues M., whose solvency is beyond doubt, for this sum as principal debtor; subsequently, but *intra eiusdem praeturae*, he wishes to sue for the remaining IV; the *exceptio litis dividuae* does not prevent him from suing S., but this course is inconvenient, S. being resident in another place; but if he sues M. as fideiussor for S., does the exception lie? No, because when T. sues M. *pro parte* as principal debtor and *pro parte* as fideiussor for S., the position is the same as if he were to sue M. and S., each in a separate *pro parte* action. This explanation may be accepted until something better is suggested.

§ 20. Actions on a Correal Obligation.

We conclude our study of correality *ex stipulatu* under the classical law with a brief note regarding the mode of suing on a correal obligation. No attempt can, however, be made to deal exhaustively with the subject, as the rules here to be applied depend on technicalities of the formulary system which have evoked considerable controversy.

Certainly the common creditor may sue any one correal debtor alone—any one correal creditor alone may sue the common debtor—in *solidum*. Likewise the common creditor may bring a separate *pro rata* action against each correal debtor—each correal creditor may bring a separate *pro rata* action against the common debtor. But we ask, Can the

¹ See *Gai.* IV. 122.

common creditor bring a single joint action in solidum against the various correal debtors together—can the various correal creditors together bring a single joint action in solidum against the common debtor,—a single *litiscontestatio* being made with or by all and a single formula granted? There seems little doubt that such a course was possible, and that here we have an instance of Quintilian's "*causa una in multis personis*" which he describes thus: "*unus a duobus dumtaxat eandem rem atque ex eadem causa petet, aut duo ab uno, aut plures a pluribus.*"¹

The case of a single joint action in solidum raises several questions:—

(a) Suppose in the passive case that the common creditor T. obtains a simple joint condemnation against the correal debtors M. and S.; can he proceed to execute this condemnation against either M. or S. in solidum, or must he split up his judgment claim and proceed against each for a half only? The late classical jurists decided in favour of the second alternative.

D. (49. 1) 10. 3. Ulpian VIII. disput.

Quotiens autem plures in unam summam condemnantur, utrum una sententia est [*et quasi plures in unam summam rei sint promittendi*],² ut unusquisque eorum in solidum teneatur, an vero scinditur in personas sententia, quaeritur. et Papinianus respondit scindi sententiam in personas, atque ideo eos qui condemnati sunt viriles partes debere.

¹ *Inst. Or.*, iii. 10. 2. Cp. Levy, *Konk.*, p. 198, n. 6 to p. 197. See also Alexander C. (5. 57) 1, where it is merely denied that *both* the principal *and* the accessory debtors can be sued together in solidum; *arg. e contr.* a joint action in solidum is competent against *either* the principal debtors together, *or* the accessory debtors together.

² Apparently a gloss.

D. (42. 1) 43. Paul. XVI. respons.

Paulus respondit eos, qui una sententia in unam quantitatem condemnati sunt, pro portione virili ex causa iudicati conveniri. . . .¹

D. (17. 1) 59. 3.² Paul. IV. respons.

Paulus respondit unum ex mandatoribus in solidum eligi posse, etiamsi non sit concessum in mandato: post condemnationem autem in duorum personam collatam necessario ex causa iudicati singulos pro parte dimidia conveniri posse et debere.

C. (7. 55) 2. Imp. Gordian. (a. 242).

Quotiens, a tutoribus singulis procuratoribus datis, insequitur in omnium persona condemnatio, periculum sententiae videri esse divisum. ideoque quod ab uno servari non potuerit, a ceteris exigi non posse explorati iuris est.

(b) But, we ask, could a passive joint condemnation ever be made in distributive form, so as to render the defendants liable *singuli in solidum* in the judgment obligation—in other words, was a correal joint condemnation ever competent? Such a condemnation seems clearly referred to in the following text:—

D. (49. 14) 39. 1. Papinian. XVI. respons.

Eum, qui periculum communis condemnationis dividi postulavit, quod participes iudicati solvendo essent, revocatis alienationibus quas fraudulentè fecerant, non videri causam pecuniae fisco nuntiasse respondi.

The demand for a *beneficium divisionis* here mentioned implies the existence of a correal judgment relation.

¹ The remainder of this fragment is apparently a gloss or interpolation; Gradenwitz, ZSS. 7, p. 65 f.

² *Vide infra*, p. 328.

Compare also—

C. (7. 55) 1. Imp. Alexander (a. 229).

Si non singuli in solidum, sed generaliter tu et collega tuus una et certa quantitate condemnati estis, nec additum ut quod ab altero servari non possit alter suppleret, effectus sententiae virilibus portionibus discretus est. ideoque parens pro tua portione sententiae, ob cessationem alterius ex causa iudicati conveniri non potes.

Apparently, then, there were circumstances under which a correal joint condemnation was competent, but any discussion as to what these circumstances were, would lead us beyond the limits of our present thesis.

(c) As regards the active case a simple joint condemnation will plainly infer pro rata judgment rights merely, and we can hardly suppose a condemnation was ever framed so as to confer correal judgment rights.

Finally there was no reason why the common creditor should not sue the various correal debtors each pro rata at one time, and conversely in the active case. Here, however, separate pro rata litis-contestationes and formulae would appear to be necessary, though all these formulae would be sent to the same iudex and the different processes disposed of together.

§ 21. Appendix. Correalty from Nexum, Litteral Contract and Testament.

Whether correalty could be produced by nexum is a question of purely antiquarian interest, which we must leave to those who have made a special

study of this contract. We merely observe that the general words of the XII. tables “*uti lingua nuncupasset, ita ius esto*” *prima facie* suggest an affirmative answer.

The opinion, frequently expressed, that correality could not be created by literal contract, is altogether without support.¹ Certainly there was no technical objection to a manipulation of ledger entries for the purpose of creating an active or a passive correal relation, and that such manipulations were actually resorted to, particularly in the case of banking transactions, is highly probable.

Levy² quotes two passages which seem to contain a reference to an active correal obligation created *litteris* in favour of bankers.

D. (2. 14) 9. pr. Paul. LXII. ad edict.

Si plures sint qui eandem actionem habent, unius loco habentur. ut puta plures sunt rei stipulandi vel plures argentarii quorum nomina simul facta sunt: unius loco numerabuntur quia unum debitum est . . .

D. (4. 8) 34 pr.³ Paul. XIII. ad edict.

Si duo rei sunt [*aut*] credendi [*aut debendi*], et unus compromiserit isque vetitus sit petere [*aut ne ab eo petatur*], videndum est an, si alius petat [*vel ab alio petatur*], poena committatur: idem in duobus argentariis quorum nomina simul eunt. . . .

Correality ex testamento is free from all difficulty. In the passive case if a legacy be granted thus: “Titius et Maevius heredes mei decem Seio danto,” without doubt T. and M. are liable merely *pro rata*. If solidarity is to be created a distributive form must

¹ Levy, *Konk.*, p. 382 ff.

² l.c.

³ *Vide infra*, p. 267, n. 1.

be employed, and, as the following passage shows, an alternative mode of damnatio sufficed for this purpose¹:

D. (30) 8. 1. Pomponius II. ad Sabin.

Si its scriptum sit: "Lucius Titius heres meus aut Maevius heres meus decem Seio dato," cum utro velit Seius aget, ut, si cum uno actum sit [*et solutum*],² alter liberetur, quasi si duo rei promittendi in solidum obligati fuissent. [*quid ergo si ab altero partem petierit? liberum cui³ erit ab alterutro reliquum petere. idem erit et si alter partem solvisset.*]⁴

Doubtless, however, any other distributive form of bequest would equally serve to exclude partition; for example, "Titius heres meus decem, Maevius heres meus eadem decem Seio dato (*or* danto)."

As regards the active case a legacy granted thus: "heres meus decem Titio et Maevio dato," will render T. and M. entitled merely pro rata.⁵ Solidarity can, however, always be created by the use of a distributive form:

D. (31) 16. Celsus XVI. digest.

Si Titio aut Seio, utri heres vellet, legatum relictum est, heres alteri dando ab utroque liberatur: si neutri dat, uterque perinde petere potest atque si ipsi soli legatum foret: nam ut stipulando duo rei constitui possunt, ita et testamento potest id fieri.

¹ But cp. C. (6. 38) 4. An alternative mode of interrogatory could not be used in the case of a stipulation by a common slave; D. (45. 3) 9. 1; 10; 21.

² I agree with Levy, *Konk.*, p. 194, n. 3, that beyond the deletion of these words no further restoration is here required; Krüger, *Dig.*, following Donellus, treats "cum utro . . . solutum" as interpolated.

³ var. lect.: ei. Mommsen: utique.

⁴ Apparently a gloss.

⁵ Cp. D. (45. 1) 56 pr., *supra*, p. 69 f.; *Gai.* II. 205.

The only point that requires attention is the rule, stated by *Gai.* II. 205, that where the same determinate species was bequeathed per damnationem to two parties "disiunctim," e.g., "heres meus Titio Stichum (dato),"¹ Maevio eundem Stichum dato," the result was cumulation; presumably the same rule held good in the passive case also. Hence, if solidarity be intended, the testator must avoid this form, or add such words as "ita ut duo rei T. et M. fiant." But in our opinion this rule held good only where the object of the legacy was specific, not where it was generic. Two bequests of the "same sum of x" could never lead to cumulation, even if made "disiunctim," because if they did, in effect two separate sums of x would be bequeathed.

¹ It seems indifferent to the disjunctive nature of the bequests whether two verbs were employed or one only.

CHAPTER III

SIMPLE AND EQUITABLE SOLIDARITY EX STIPULATU UNDER THE CLASSICAL LAW

§ 22. Simple Solidarity and Contrasted Relations.

THE most novel feature of the present work is the theory of simple or non-correal solidarity which it sets forth. Simple solidarity, as here conceived, is a degeneration of the civil law institute of correality, and was introduced by the classical jurisprudence to meet the case where a joint contract is incapable of producing correality on account of some material "inequality" or "non-identification."¹

This institute of simple solidarity I believe to have taken its rise within the sphere of real and consensual contracts. As we have seen,² any formal inequality or non-identification in a correal stipulation rendered the act wholly "inutilis," and probably under the strict civil law material inequality or non-identification had the same effect.³ On the other hand, in the case of a joint real or consensual contract there can be no such thing as formal inequality or non-identification, and to hold such a joint contract ineffective on the ground of material inequality or non-identification would, as we shall explain later,⁴ have been quite anomalous. Hence to meet this latter case I conjecture that jurisprudence evolved a solidary relation based, not on process-consumption, but on solutio-consumption merely, and

¹ *Vide supra*, p. 106 ff.

² *Supra*, p. 93 ff.

³ Cp. *supra*, pp. 20, 108 f.

⁴ *Infra*, p. 246 ff.

that eventually this new and, from the strict civil law standpoint, degenerate institute gained a footing within the realm of obligations *ex stipulatu*. When all the constitutive requisites of a correal stipulation were fulfilled, but correalty was excluded by reason of some material inequality or non-identification, the jurists of the mature classical period or even earlier, instead of pronouncing the act ineffective, treated it as productive of a simple solidary relation.

The cardinal principles of simple solidarity are thought to be as follows:—

(i) There is no constructive identification of the two obligations—no “*eadem res*”; Papinian, we believe, states the position by the words “*in cuiusque persona propria singulorum consistit obligatio*.”¹

(ii) As there is no “*eadem res*,” *litiscontestatio* has no extensive consuming effect.

(iii) As there is no “*eadem res*,” there can be no extensive responsibility.

(iv) In spite of the absence of “*eadem res*” *solutio* has, at law and not merely in equity,² extensive consuming effect.³

¹ D. (45. 2) 9. 2 ; *vide infra*, p. 282 ff.

² The Roman distinction between law and equity (*ius civile* and *ius honorarium* (*praetorium*)) calls for a few remarks. In the first place, the fundamental ideas on which this distinction is based agree largely with those which we find in England; this fact places the English student in a highly privileged position for understanding the Roman conception of equity. In the second place, however, law and equity were not administered in different tribunals (as they were in England until recently), and this circumstance (above all others) for long prevented any sharp delineation between the two systems. Rules and institutes, whose initial value was merely equitable, were constantly being “received” into the civil law which, by this means especially, underwent a great expansion as time progressed. Thus, to take an example from the subject-matter of this work, the *exceptio rei iud. vel in iud. ded.* must originally have been of a purely equitable nature, but it also must, at a comparatively early date, have attained a civil law status (cp. *supra*, p. 112, n. 1). In point of fact, we may say that not until the

Simple solidarity, as well as correality, thus stands opposed to cumulation, but in a different sense.

mature classical period, when Julian published his consolidated *Edictum Perpetuum*, were the respective spheres of the *ius civile* and the *ius honorarium* fixed with precision. In the third place, in answer to the question, What was the distinction between the two systems? we can say no more than as follows: The *ius civile* was the body of traditional and statutory Roman rules and institutes which, in a sense, occupied a position independent of magisterial activity, though their efficacy was liable to be counteracted by the latter; the systematisation and interpretation of the *ius civile* formed an important branch of Roman jurisprudence, which sought to make the ancient rules and institutes advance as far as possible with the times; if our views be sound, the evolution of simple solidarity out of correality provides a notable illustration of this last statement. The *ius honorarium*, on the other hand, derived its force entirely from the imperium of the different magistrates (notably the praetor urbanus), and was designed to "assist, supplement, and correct the civil law" (Papinian. D. (I. 1) 7. 1); its principles were embodied in the various edicts, which also were the subject of juristic interpretation; but where the appropriate edict and the jurisprudence based thereon were silent, the magistrate had, in accordance with a fundamental political principle of the Romans, a prerogative right to exercise his imperium as he deemed best for the execution of justice.

The distinction between *ius civile* and *ius honorarium* should be kept apart from that between *ius civile* and *ius gentium*. This latter distinction is based on the fact that, whereas on the one hand the original rules and institutes of the law of Rome bore a rigidly national stamp and applied to Roman citizens alone, on the other hand the legal system was latterly developed and expanded, so as to embody rules and institutes which were in a sense "natural" and common to all advanced nations, and which, as forming a part of Roman law, were admitted to be applicable to non-citizens as well as to citizens.

When we wish to indicate the original principles of the *ius civile*, as contrasted either with later juristic innovations in general or with the *ius gentium* in particular, it is convenient to use the phrase "*strict civil law*"; on the other hand (ignoring Roman usage) we deem it best generally to avoid this phrase in distinguishing *ius civile* and *ius honorarium*.

³ Whether *acceptilatio* had an extensive consuming effect as between simple solidary obligations is doubtful. On the one hand, if we attach predominating importance to the original and formal aspect of this *negotium* as a receipt of payment, we must accord it the same consumptive force as the material fact of payment itself. On the other hand, if we take into account the fact that in classical times *acceptilatio* was normally employed as a means of discharging obligations without payment (see *Gai.* III. 169), then we may deny it extensive consuming effect. The probabilities are, I think, in favour of the first view.

According to the strict civil law, correality and cumulation exhausted the whole field of possible relations. If *litiscontestatio* had extensive consuming effect, the result was correality ; if it had not, the result was cumulation. Under the mature classical jurisprudence, on the other hand, we have a new relation which stands opposed to cumulation because of the extensive consuming effect here attributed to *solutio*, but not to *litiscontestatio*. When, applying the principles of the strict civil law, we say that a correal stipulation cannot result in cumulation, we mean that it cannot produce obligations which do not stand to one another in a process-consumption relation ; if it be incapable of producing obligations so related, it is "inutilis."¹ But on an application of the principles of the mature classical jurisprudence, the statement that a correal stipulation cannot result in cumulation means that the obligations which it produces must at any rate stand in a *solutio*-consumption relation, whether or not they also stand in a process-consumption relation. Thus, as simple solidarity was a legal, and not merely an equitable relation, the classical jurisprudence in effect achieved a substantial evolution in the domain of the civil law.

The antithesis simple solidarity *v.* partition requires a word of remark. If we adhere strictly to the principle that partition implies an ideal correal obligation,² we must, in all cases where the possibility of two co-creditors or co-debtors being correally related is excluded, likewise exclude the possibility of their being entitled or bound *pro rata*. Nevertheless, in cases where the possibility of correality is

¹ We omit the case where it is held to produce a valid simplex obligation ; *vide supra*, pp. 88, 96, 106.

² *Vide supra*, p. 30 f.

excluded merely through the "individualised" nature of the prestation-object, and the latter is capable of division, it would be unreasonable to deny, on the foresaid technical ground alone, the possibility of partition as an alternative to simple solidarity. In short, we must admit that under exceptional circumstances partition may imply an ideal solidary obligation which is simple merely.

As in correality, so also in simple solidarity, the principle of "subjective alternativity," which is the predominating element in all solidarity, must have free scope. The common creditor must have the power of "electing" any one of his simple solidary debtors; any one simple solidary creditor must have the power of "occupying." Any element which impedes the free exercise of these powers excludes solidarity.

But further, we must, I believe, regard "*substantial* equality of prestation"¹ as another indispensable element in simple solidarity. Thus we cannot conceive of an obligation *dari* and an obligation *fieri* standing in a simple solidary relation; nor do I think we can ever have simple solidarity without equality of prestation-object, though this requirement has a different significance here than in the case of correality. In correality the equality last mentioned must be *in toto*, that is, the one full prestation-object must be equal to the other full prestation-object. Thus, consider two obligations (a) *decem dari* and (b) *sex dari*. For purposes of correality it is not permissible to analyse obligation (a) into two obligations (c) *sex dari* + (d) *quattuor dari*, and then to say that obligations (c) and (b) may be correally related and obligation (d) left outstanding. Taken

¹ As contrasted with the *absolute* equality essential to correality; *supra*, p. 18 f.

each as a whole, obligations (*a*) and (*b*) are unequal, and for purposes of correality no *pro tanto* equality between them can be recognised.¹ On the other hand for purposes of simple solidarity the aforesaid analysis is legitimate. Thus, to take the same example, a simple solidary relation may exist between obligations (*c*) and (*b*), with obligation (*d*) left outstanding. Likewise, if we have two obligations, (*a*) *decem et Stichum dari* and (*b*) *decem dari*, it is permissible, for purposes of simple solidarity, to analyse obligation (*a*) into two obligations (*c*) *decem dari* + (*d*) *Stichum dari*, and to proceed in the same way as before.

The crucial case, however, is that where obligation (*a*) has a compound prestation-object in the alternative, e.g., *decem aut Stichum dari*, and obligation (*b*) has a simple prestation-object consisting of one of the same alternative elements, e.g. *decem dari*. Can we regard these two obligations as standing in a simple solidary relation? Yes, we think, but in one way only, namely, by construing obligation (*a*) as an obligation *decem dari* subject to the modality of an alternative prestation-object. The significance of this construction lies in the fact that the modality "aut Stichum" only affects obligation (*a*), and hence the giving of Stichus cannot at law extinguish obligation (*b*).²

The whole matter may be summed up by saying that, though in simple solidarity the classical jurisprudence had managed to dispense with the idea of unity of obligation, it was, we think, far from attaining the conception of pure subjective alternativity as a legal relation. An equality of prestation-object, be it only a constructive *pro tanto* equality, was³ still

¹ Cp. *supra*, pp. 19, 93.

² See further *infra*, p. 165 f.

³ Together with homogeneity of prestation; *supra*, p. 16.

required in order to establish a relation in which solutio-consumption would operate extensively at law.

In our introductory chapter¹ we stated our adherence to the view that in all solidarity we have a plurality of obligations directed to one and the same juristic end (based on one and the same material cause, designed to satisfy one and the same economic interest). In the case of correality, indeed, this unity of juristic end is merged in the larger unity of obligation, but in simple solidarity such larger unity is lacking so that the unity of juristic end operates *per se*. The idea of unity of juristic end in the case of simple solidarity *ex stipulatu* now requires careful consideration. Stipulation is essentially an abstract negotium from which the element of juristic end (material cause, economic interest) is formally eliminated.² How then can the law treat two obligations *ex stipulatu* (not constructively identified) as directed to the same juristic end and so standing in a solidary relation?

The answer to this question is that the unity of juristic end which we find in simple solidarity *ex stipulatu* can only be the reflex of an unity of originating cause. The exclusion of cumulation which the latter unity here carries with it,³ implies an unity of juristic end even as between two purely abstract obligations; the statement that two obligations arise from the same stipulatory act but are directed to different juristic ends, would contain a *contradictio in adiecto*. But what, it will be asked, if unity of originating cause is lacking? In such case, we reply, the law can have no ground on which to treat two abstract obligations as directed to the same juristic end. Well, if this be so, we must conclude that simple

¹ *Vide supra*, p. 11 f.

² *Cp. supra*, p. 12, n. 1.

³ *Vide supra*, p. 60 ff.

solidarity, like correality, *ex stipulatu* is legally impossible without unity of originating cause, in other words, it can only arise from a correal stipulation. Whether this result must be modified so as to admit the establishment of simple solidarity *ex diversis causis* indirectly by means of reciprocal conditions, will be considered in a later section,¹ and a negative result arrived at. Solidarity *ex stipulatu* without unity of originating cause can only be attained through the aid of equity.²

This brings us to what we venture to lay down with full confidence as a leading principle in this branch of our subject, namely, that anything in the nature of solidarity (as between principal obligations³) without unity of originating cause was abhorrent to the civil law; the doctrines of the latter relative to solidarity were evolved within the strict domain of abstract obligations *ex stipulatu*, and here unity of originating cause was fundamental. The principle referred to is, I think, evidenced in the first place by the relation of principal debtor and independent guarantor by stipulation.

Suppose that T. stipulates from M.: “*decem dari spondes*”?⁴ and that he subsequently stipulates from S., “*ex eis decem quae Maevius mihi dare spopondit, quanto minus ab illo consecutus sim*,⁵ *tantum dari spondes*?”; we call S. an independent guarantor

¹ *Infra*, p. 202 ff.

² The result that legal solidarity is impossible without unity of originating cause carries with it the further result that partition is equally impossible without unity of originating cause. Partition implies an ideal solidary obligation which is normally correal, but may under certain circumstances be merely simple; *vide supra*, pp. 30, 150 f.

³ Unity of originating cause was not necessary in the case of accessory correality; see my subsequent treatise of Accessoriality.

⁴ The same rules apply however the principal obligation originates.

⁵ Or “consequi possim,” “exigissem”; see the authorities quoted *infra*, p. 176 ff.

by stipulation on M.'s behalf. As a result of the second stipulation, S. becomes liable for the full x already promised by M., and to this extent we have here a resemblance to solidarity. This case, as we shall see presently,¹ was a source of considerable trouble to the jurists, the reason undoubtedly being that it did not fit in very easily with strict civil law principles. The result which Paul, and we may presume the late classical jurists generally, arrived at was to deny any liability on the part of S. until T. had been "discussed" and a deficiency in his resources disclosed. Thus T. was deprived of his power of election and solidarity was excluded.

In order, however, to illustrate the repugnance of the civil law to solidarity without unity of originating cause, we shall meanwhile assume that T. has a power of election. We ask, Does the relation of M. and S. then become one of simple solidarity? The practical significance of this question lies in the fact that if M. and S. stand in a relation of simple solidarity, payment by either of them "liberates" the other, and this would seem to be the natural result. There can be little doubt, however, that the question propounded should be answered in the negative. The actual result which the late classical jurisprudence must have arrived at, even if it had preserved T.'s power of election, is that on the one hand payment by S. leaves T.'s right against M. legally intact and so capable of assignment to S., and that on the other hand payment by M. does not "liberate" S., but renders his obligation non-existent *ab initio*.²

¹ *Infra*, p. 178 ff.

² "Liberation" in the strict sense implies an obligation which is perfect (*i.e.*, free from any suspensive condition), or, for the purpose in hand, may be deemed to be so. This may be explained as follows:—Suppose M. promises x to T. "*si navis venerit*"; to commence with,

In the discussions regarding independent guarantee¹ we can hardly fail to perceive the antagonism of the civil law to anything in the nature of solidarity without unity of originating cause. All difficulty would have been removed, had jurisprudence felt itself entitled to lay down that *solutio* by either the debtor or the guarantor liberated the other. The exclusion of solidarity may indeed be explained in another way as follows:—Formally S. does not promise x but an uncertain sum not exceeding x; hence we have such an inequality of prestation as is inconsistent with a solidary relation. But this inequality of prestation is immediately connected with the diversity of originating cause. Had S. formally promised the same x as M. already owed² from another cause, the result would inevitably have been novation; if the obligations of M. and S., arising *ex diversis causis*, are to subsist side by side, a formal inequality of prestation is essential. Conversely, had the principal and the guarantee promises been made by means of a single joint stipulation, the formal inequality of prestation would have rendered the whole act void; if the two obligations are to have unequal prestations, diversity of originating cause is essential. Hence, as formal

this obligation is imperfect (*vide supra*, p. 13 f.). If the ship duly arrives the obligation becomes perfect, and any subsequent dissolution of the obligatory tie is a "liberation." But suppose, before the ship arrives and while it is yet uncertain whether it will arrive, T. releases M. This is also a "liberation"; for the purpose of the release, it makes no difference if we deem the ship to have arrived and the obligation so to have become perfect; the disappearance of the obligation does not here imply any failure of the condition to which it was subject. On the other hand, if the ship fails to arrive and it is certain that it will never arrive, M. is not thereby "liberated"; here the obligation is prevented, *by failure of the condition*, from reaching perfection—is rendered non-existent *ab initio*.

¹ *Vide infra*, p. 176 ff.

² Or was about to owe; see D. (46. 2) 8. 2.

inequality of prestation and diversity of originating cause are reciprocally conditioned, it matters nothing to which we attribute the exclusion of solidarity; for our present purposes, however, diversity of originating cause is the vital point.

The same repugnance of the civil law to anything in the nature of solidarity without unity of originating cause shows itself also in the relations of principal debtor and mandator, constituens, argentarius recipiens.¹ None of these relations, of course, belonged to the strict civil law, but yet the principles of the latter, as evolved within the sphere of abstract obligations *ex stipulatu*, make their influence felt here also. These relations, together with the previous one of principal debtor and independent guarantor by stipulation, may be described as "contrasted" with simple solidarity, inasmuch as they show the exclusion of solidarity through absence of unity of originating cause. We shall see a still more striking example of the same repugnance of the civil law to solidarity without unity of originating cause, when we come to consider the case of two independent mandates directed to the same juristic end.²

Simple solidarity *ex stipulatu*, then, arises solely from a correal stipulation in which there is present some element rendering the two obligations materially unequal³ or, though equal,³ incapable of identification. A clear example of material inequality is where two parties stipulate correally for, say, "decem et (aut) Stichus," but Stichus happens to belong to one of them. A clear example of the exclusion of identifica-

¹ *Vide infra*, pp. 183 ff., 185 ff., 191 f. ² *Vide infra*, pp. 317 ff., 322.

³ *Absolute* equality or the absence thereof is here referred to; though unequal from the absolute standpoint, two obligations must, for purposes of simple solidarity, be equal *substantially*; *supra*, p. 151 f.

tion between two equal obligations, is where two parties correally promise services which are "individualised" by the person of him who renders them. Other examples of the exclusion of identification between two equal obligations, are provided by the cases where two parties stipulate correally for the same usufruct, or for the same sum *dotis nomine*, a usufruct or dos being "individualised" by the person of him to whom it is granted; here, however, partition offers itself as a solution of the problem.

In the following section (§ 23) we shall discuss the two fragments, Gaius D. (45. 2) 15 and Julian. eod 5, where these examples are given. No doubt our results depend almost entirely on conjectural restorations of the fragments quoted, but nevertheless they seem eminently reasonable, and in accordance with the spirit of the classical jurisprudence. As we shall see later (§ 30), the effect of the Justinianian reforms was to eliminate the classical distinction between correality and simple solidarity, which fact amply explains the scantiness of our authorities regarding this distinction.

The question may be asked whether parties had it in their power to reduce, by special agreement, a correal relation to one of simple solidarity? To this question a decided negative answer must be given. Provided the two prestations are absolutely equal, and there is nothing in their nature to prevent their identification, correality is the civil law result, and any attempt to modify the stipulatory formula so as to exclude this result will nullify the whole act. Nor, in our opinion, can the effect of a correal stipulation be in any way modified by independent pacts; this point, however, it will be more convenient to discuss when we are dealing with solidarity from

real and consensual contracts.¹ A correal relation can only be reduced to one of simple solidarity, through, as it were, accidental circumstances which, under the strict civil law, would render the act ineffective.

Finally, let us consider the form :

Titius : Maevi, decem dari spondes ?

Maevius : spondeo.

Titius : Sei, eadem decem dari spondes ?

Seius : spondeo.

Here a valid obligation is in any event created between T. and M.; but if any break in the continuity of act, as already explained,² occurs between M.'s reply and the question to S., in such case, the latter's promise must, I believe, be pronounced void, on the ground that "eadem" is thereby formally deprived of an antecedent and the question to him (S.) accordingly becomes meaningless.

But, suppose no such break occurs, what is the net result of the act? In the first place, does S.'s promise novate the already constituted obligation of M.? This I believe to be impossible. Diversity of originating cause is essential to novation, but here the stipulations from M. and S. form a continuous act, the two parts of which are connected by "eadem" without any further express identification of the two prestations. If novation be intended, the words "quae Maevius dare spondit" or the like, must be inserted in the question to S., in which case the two stipulations, even though they follow the one immediately on the other, are shown to be formally independent, and the later one has novatory effect. In the second place, we ask, Can the result be cumula-

¹ *Vide infra*, p. 248 ff.

² *Supra*, p. 90 f.

tion? Again, a negative answer must be given; the term "eadem," considered in conjunction with the continuity of act, identifies the two sums of x as one and the same, and hence excludes a cumulative relation. In the third place we ask, Can the result be simple solidarity? Again, we believe, the answer must be in the negative. Though the proceedings form a continuous act, yet we have here two simplex stipulations, not a single joint one, and hence simple solidarity, equally with correality, is excluded.

Under the strict civil law, then, I venture to think, S.'s promise must be pronounced incapable of producing any result, and hence "inutilis." In my treatise on Accessoriality, however, I shall show grounds for believing that the classical jurisprudence of the Empire had resort to this form for the purpose of taking bound a principal debtor and sponsor (fidepromissor).

Likewise, in the case of the converse form :

Maeuius : Titi, decem dari spondes ?

Titius : spondeo.

Seius : Titi, eadem decem dari spondes ?

Titius : spondeo,

which seems to be that referred to in *Inst.* III. 16, pr. (δ),¹ S.'s stipulation must, I believe, be pronounced ineffective under the strict civil law. On the other hand, the classical jurisprudence of the Empire, I believe, utilised this form for the purpose of rendering M. entitled as principal creditor, and S. as adstipulator, it being assumed that no breach of continuity takes place between the answer to M. and the question by S. In the passage of the *Institutes* cited, where the existence of correality

¹ *Vide supra*, p. 65 ff.

is denied by the words "nec creduntur duo rei stipulandi esse," apparently what the classical author (Florentine) meant to imply, and perhaps stated explicitly, was that, in place of a correal relation, an accessorial relation of principal creditor and ad-stipulator is here established between M. and S.

The disposition of the remaining sections of this chapter is as follows :—

In § 23, as already stated, we shall examine the two fragments which bear directly on simple solidarity *ex stipulatu*.

In § 24 we shall examine the authorities on the "contrasted" relations of principal debtor and (i) independent guarantor by stipulation, (ii) mandator, (iii) constituens, (iv) argentarius recipiens. Here we shall see in practical operation the reaction of civil law principles against anything in the nature of solidarity without unity of cause.

§§ 25 and 26 will be dedicated to equitable solidarity, and finally in § 27 we shall discuss the question of solidarity through reciprocal conditions without unity of originating cause.

§ 23. Authorities. (§ 22 (A). Simple Solidarity.)

(1) D. (45. 2) 15. Gaius II. de verb. obligat.

a. Si id, quod ego et Titius stipulamur, in singulis personis proprium intellegatur, non poterimus duo rei stipulandi constitui, veluti cum usum fructum aut dotis nomine dari stipulemur : idque et Iulianus scribit.

β. idem ait, et si Titius et Seius decem aut Stichum, qui Titii sit, stipulati fuerint, non videri eos duos reos stipulandi, cum Titio decem tantum, Seio Stichus aut decem debeantur :

γ. quae sententia eo pertinet ut, quamvis [*vel huic vel illi decem solverit vel Seio Stichum*]
 < ~ >,¹ nihilo minus alteri obligatus [*manet*]
 < ~ >,² sed [*dicendum est ut*], si decem
 alteri solverit, ab altero liberetur.

We shall consider periods β and γ of this fragment first. Suppose a correal stipulation to be made as follows :

Titius : Maevi, decem dari spondes ?

Seius : Maevi, eadem decem aut Stichum dari spondes ?

we have no hesitation in pronouncing the act wholly void on account of the formal inequality of prestation. But the case contemplated by Gaius is that of a formally valid correal stipulation :

Titius : Maevi, decem aut Stichum dari spondes ?

Seius : Maevi, eadem decem aut eundem³
 Stichum dari spondes ?

where the constitution of a correal obligation is prevented merely by the fact that Stichus happens to belong to T. The rule that no one can validly stipulate for what belongs to himself, causes a material inequality⁴ of prestation which excludes the possibility of identification and hence of process-consumption.

Now what is the result of such a stipulation ? The ancients, I venture to think, would have pronounced the whole act ineffective, but, as our

¹ *cum altero acciperet promissor iudicium*

² *maneret*

³ The omission of "eundem" would, in my opinion, be quite regular, the preceding "eadem" being sufficient to connect the two questions as parts of the same interrogatory. So also if Stichus had been mentioned first, the "eadem" before "decem" might have been omitted on the same ground ; cp. *supra*, p. 61 ff.

⁴ *Vide supra*, p. 157, n. 3.

present fragment shows, this was not the view adopted by the mature classical jurisprudence.

Period γ , however, bears evident marks of the Compilers' hands. Its substantial faults are the omission of any reference to process-consumption which was the all-important matter from the civil law standpoint, and also the contradiction between the first statement that solutio of x to either creditor (or of Stichus to S.) leaves the common debtor bound to the other, and the second statement that solutio of x to either frees him (the debtor) from the other. The text also bristles with formal defects. The verbs (with the exception of "pertinet") have no subject. *Ut* + indic. (manet), if not absolutely impossible,¹ is at any rate highly suspicious. The passage "vel huic . . . Stichum" is inelegant as regards both the use of "vel" (different particles should have been used to connect "huic" and "illi" and to connect the two branches of the clause) and the alternation of pronoun (huic, illi) and noun (Seio). *Dicere* + *ut* is at any rate highly suspicious.²

So far as I am aware, no one has yet hit on a satisfactory restoration of γ , but I venture to suggest the following:—Delete the defective "vel huic . . . Stichum" passage and substitute "cum altero acciperet promissor iudicium"; change "manet" to "maneret"; delete "dicendum est ut."³

So restored, period γ attests the existence of a simple solidary relation in the case figured: "Although

¹ See Kalb, *Wegweiser*, p. 101.

² Levy, *Konk.*, p. 505; cp. VIR. II., col. 220 D.

³ Other restorations leading to the same substantial result will readily suggest themselves, e.g., . . . ut, quamvis iudicio cum altero accepto promissor nihilominus alteri obligatus manet (as to *quamvis* + indic., see Kalb, *op. cit.*, p. 114), tamen, si decem alteri solverit, ab altero liberetur; here "ut" governs the final "liberetur" only.

litiscontestatio by one of the creditors would not legally extinguish the right of the other, yet solutio of x to one of them does so.”¹ This was, I believe, the only result that the classical jurisprudence could reach as an alternative to holding the entire act “inutilis.” In particular I must reject any suggestion that the result here was legal cumulation reduced in equity to solidarity.² A correal stipulation could never produce cumulation; in fact, according to the strict civil law it could never produce other than a process-consumption relation based on eadem res, though the mature classical jurisprudence, as we believe, allowed it under certain circumstances to produce a solutio-consumption relation independent of eadem res.

Assuming the soundness of our restorations, the Compilers’ manipulations of period γ present no difficulty. In the first place they substituted a denial of solutio-consumption for the original denial of process-consumption, and in so doing inadvertently dropped the subject “promissor.” In the second place they changed “maneret” to “manet,” the force of the *irrealis* being now lost. In the third place they inserted “dicendum est ut” in order to soften

¹ It is to be observed, however, that though extensive process-consumption does not here operate at law, yet the praetor might quite well recognise the creditor who first joins issue as having a preferential claim in equity to solutio, and accordingly refuse a further action to the other creditor. Moreover, even if the praetor did not here attribute such “occupatory” force to litiscontestatio, he might still attribute a like force to judgment; in such case, when either one of the creditors had obtained a favourable sententia, any judgment obtained subsequently by the other would be futile, inasmuch as no actio iudicati would be granted thereon, even though the first mentioned creditor had not yet received solutio. Cp. *supra*, p. 123; also D. (9. 4) 14 pr.

² This is the view of Levy, *Konk.*, p. 506, who regards “judicial consumption by means of exceptio doli” as the most likely mode of excluding cumulation, and refers to Gaius D. (45. 1) 141. 5 and Ulpian. D. (32) 11. 21.

the contradiction resulting from the first of these manipulations.

One point in γ deserves attention. At the end of the period, Gaius does not say that solutio of Stichus to S. frees the debtor from T., and this omission has been a frequent source of trouble to commentators. Levy,¹ indeed, summarily dismisses the point by observing that Stichus belongs to T.; this being so, the debtor could not, it is here inferred, give him to S. In my opinion, however, the difficulty cannot be got over in this simple manner. We must ask ourselves whether the debtor, if he procured a transfer of the property in Stichus from T. and then assigned the same to S., was thereby freed from T.

The correct answer to this last question is thought to be that the debtor was not freed from T. at law, but was freed in equity. In the case before us one of the obligations (*Seio decem aut Stichum dari*) has a compound prestation-object in the alternative, while the other (*Titio decem dari*) has a simple prestation-object consisting of one of the same alternative elements. In order, then, to construct a *pro tanto* equality of prestation-object for the purposes of simple solidarity, we must, I believe, interpret the first obligation as *decem dari* subject to the modality of an alternative prestation-object (*aut Stichum*). But under this interpretation Stichus must be left out of account so far as the simple solidary relation is concerned, for the modality affects the first obligation merely, not both.² If then the common debtor, having acquired the property in Stichus, assigns the same to S., he is certainly under no further liability to the latter, but such solutio cannot at law prejudice

¹ *Konk.*, p. 505, n. 13 ("Stichus Titii est!").

² *Vide supra*, p. 152.

the right of T. to claim x. On the other hand, however, it would be quite inequitable to allow T. to exercise this legal right. If the latent defect in the correal stipulation had not existed and correality had therefore been established, solutio of Stichus to S. would of course have freed the debtor from T.; but in equity T.'s position cannot be rendered better as a consequence of the said defect and contrary to the evident intentions of parties.

We therefore reach the result that solutio of x to either T. or S. operates a full legal release of the common debtor, whereas solutio of Stichus to S.¹ does not free the common debtor from T. at law, but does so free him in equity. In fact, I think it well within the bounds of probability that Gaius after γ continued somewhat as follows: "sed si Stichus postea desierit Titii esse eumque promissor Seio dederit, an a Titio liberetur, quaeritur. et Iuliano placet iure non liberari sed exceptione doli adiuvari."

We now turn to α. The purport of this period is that two parties cannot with effect stipulate correally for a prestation which is "individualised" by the person of the particular creditor, for the obvious reason that identification of the two prestations is here impossible. Two appropriate examples are quoted, namely, that of a stipulation *usumfructum dari* and that of a stipulation (*aliquid*) *dotis nomine dari*.²

¹ It is to be observed that if Stichus belonged to T. at the time of the stipulation, then, even though he subsequently ceases so to belong, the common debtor cannot give him to T. in fulfilment of the obligation; see D. (45. 1) 128 (β) *supra*, p. 110 f.

² We cannot here enter into any detailed discussion of the various elements which caused a usufruct and a dos to be "individualised" by the person of the usufructuary or husband. As regards usufruct we may remark that this right was always considered as of a peculiarly personal nature; cp., e.g., Paul. D. (45. 3) 26: "ususfructus sine

It is important to observe the exact purport of Gaius's decision. He does not deny that I and Titius can stipulate for the same usufruct or for the same thing *dotis nomine*; all he says is that we cannot be constituted correal creditors. Thus, leaving aside the obvious case of separate stipulations leading to cumulative rights, it would, I consider, be possible for us to stipulate jointly for the same usufruct so as to render ourselves entitled *pro rata*, *i.e.*, each to a *pro indiviso* share of the usufruct. Again, assuming us both to be prospective (or actual) husbands,¹ it would, I consider, be possible for us to stipulate in like manner *dotis nomine*.

But further, it would seem quite competent for me to stipulate as principal creditor and T. as adstipulator, and very probably this was the case that Gaius was here thinking of. When two stipulators are described as "*ego et Titius*," as a rule "*ego*" is sole principal creditor, while "*Titius*" occupies some sort of subsidiary position. So here Gaius's meaning may be that, though I and T. may perfectly well stipulate for a usufruct or *dotis nomine* as principal creditor and adstipulator respectively, we cannot constitute ourselves principal

persona esse non potest et ideo servus hereditarius inutiliter usum fructum stipulatur." Moreover, a usufruct was limited by the life and caput of the usufructuary, so that it might vary greatly in point of duration according as it was granted to this party or that. As regards *dos* it may be remarked that a *dos* was essentially designed to enable a particular husband to bear the burdens of a particular matrimonial relation; cp., *e.g.*, Paul. D. (23. 3) 56. 1: "*ibi dos esse debet ubi onera matrimonii sunt.*" Moreover, the recovery of the *dos* was often intimately connected with the duration of the husband's life and his matrimonial conduct, so that the position might turn out quite differently accordingly as the *dos* were granted to this husband or that.

¹ This assumption is necessary, for if either of us is not a prospective (or actual) husband he cannot be a dotal creditor at all; cp. Gaius D. (45. 3) 8.

correal creditors. Further discussion of the case where I and T. are principal creditor and adstipulator must be reserved for our treatise on Accessoriality.

Meanwhile we ask, Suppose I and T. do stipulate correally for a usufruct, or, being both prospective (or actual) husbands, dotis nomine, what is the legal result? Three alternatives seem to be open: (i) to hold the whole act "inutilis"; (ii) to hold us entitled each pro rata; (iii) to hold our relation to be one of simple solidarity. Personally, I think the second is the most likely solution, assuming the nature of the prestation-object to admit of the same. I have already ventured the conjecture that in the mature classical period there were still some who held every active joint stipulation, even if distributively framed, productive of partition merely,¹ and if this be so, a distributive interrogatory and partition cannot, in the active case, have been deemed irreconcilable. Under these circumstances partition was the obvious solution in the case before us where correalty was excluded, the validity of the act being thus preserved without any resort to simple solidarity. If, however, a case should arise where the nature of the prestation-object excluded the possibility of partition, then simple solidarity would seem the natural result.²

¹ *Vide supra*, p. 130.

² With regard to period a, Levy's opinion (*Konk.*, p. 504, n. 1) is that the act must be declared "inutilis" unless the inner relation or other circumstances show that one of the stipulators (ego) is materially entitled alone, while the other (Titius) is "at the highest" solutionis causa adiectus. But how one of the active parties to a joint stipulation could ever be a mere solutionis causa adiectus, I have difficulty in seeing, and in any event it seems impossible that the efficacy of the act should be dependent on the material conditions indicated. Levy also suggests that Gaius may have added some remarks in the form of a *divisio* after "stipulemur" or "scribit"; this suggestion is not improbable, but we have no means of verifying it.

(2) D. (45. 2) 5. Julian. XXII. digest.

α. Nemo est nesciat [alienas] operas promitti posse et fideiussorem adhiberi in ea obligatione,

β. < - > ¹

γ. et ideo < - > ² nihil prohibet duos reos stipulandi constitui [*vel promittendi, sicuti*] si ab eodem fabro [*duo rei stipulandi*] easdem operas stipulentur,

δ. [et] < ~ > ³ ex contrario duo fabri < - > ⁴ eiusdem peritiae < - > ⁵ easdem operas promittere intelleguntur [et] < ~ > ⁶ duo rei promittendi fieri.⁷

We shall consider periods γ and δ in the first place. That Julian wrote these periods in their present form is quite impossible. In γ we at once remark the awkward tacking on of “*vel promittendi*” to “*duos reos stipulandi constitui*”; the expression, “*sicuti si*,” which is ἀπαξ λεγόμενον in the sense of “for example if,” though well authenticated in the sense of “in like manner as if”⁸; the inelegant iteration of “*duo rei stipulandi*.” We therefore delete the words “*vel promittendi sicuti*” and “*duo*

¹ *sed sine consensu stipulatoris solvere cum non posse: operae enim in persona eius qui promittit propriae consistunt nec per alienas operas solutas reus liberatur:*

² *quamquam*

³ *tamen*

⁴ *quamvis*

⁵ *nec*

⁶ *nec*

⁷ The restoration given by Beseler, III., p. 142, to which we shall have occasion to refer, is as follows:—

Nemo est qui nesciat alienas operas promitti <non> posse [et] <nec> fideiussorem adhiberi in ea obligatione, et ideo [nihil prohibet] <nec> duos reos stipulandi constitui [*vel promittendi, sicuti*] si ab eodem fabro duo [*rei stipulandi*] easdem operas stipulentur: et ex contrario duo fabri [*eiusdem peritiae*] easdem operas <inutiliter> promittere intelleguntur [et] <nec> duo rei promittendi fieri.

⁸ VIR. v., col. 529, 539.

rei stipulandi”¹; there can be little doubt that “vel promittendi” was added by the Compilers for the purpose of generalisation (and, as we shall presently see reason to believe, in contradiction to the classical law), and that “sicuti” and “duo rei stipulandi” were further added by them in view of this generalisation. Beseler also takes exception to the words “nihil prohibet” (= οὐδὲν κωλύει) as betraying the Greek hand. But while admitting the force of his argument, I cannot regard it as impossible that Julian did actually use these words.²

In period δ, as it stands, the emphasis seems to be on the words “eiusdem peritiae”; the test whether two smiths can or cannot bind themselves correally is whether or not they are of the same skill. But assuredly no classical jurist would ever have set up a test of such a vague and altogether subjective nature. Beseler proposes to delete “eiusdem peritiae,” but it is much more probable that these words were found in Julian’s text.

Now as to the restoration of Julian’s argument. In the first place we observe that the Compilers by their introduction of “vel promittendi” in γ, have made the same principle apply to both the active and the passive case, and this very fact renders it highly probable that originally the two decisions were different; the words “ex contrario” in δ also render a slight support to this view. In the second place we observe that on principle there seems no reason why two parties should not be correally entitled to the same operae, for services in general are certainly not individualised by the person of him to whom

¹ “duo” is unnecessarily retained by Beseler.

² “nihil prohibet” seems perfectly genuine in Papinian. D. (46. 3) 41 (not cited by Beseler); “nihil vetat” in Gaius D. (44. 2) 15 (Beseler, II., p. 146) seems likewise genuine.

they are rendered.¹ In the third place, however, we observe that services, at any rate if they are to any appreciable degree skilled, are essentially individualised by the person of him who renders them, and the more highly skilled they are, the more pronounced the individualisation becomes. Hence the law may, with good reason, refuse to admit that (skilled) services to be rendered by one individual can ever be identified with (skilled) services to be rendered by another individual, for the purpose of constituting a passive correal obligation.²

If we assume the foregoing observations to represent the substance of Julian's argument, then what the Compilers have done is to invert the decision so as to make the passive case agree with the active, a quite impracticable condition as to equality of skill being, however, imposed in the passive case. That such an inversion of Julian's decision was actually carried out is rendered highly probable by Ulpian. D. (46. 3) 31 :—

Inter artifices longa differentia est et ingenii et naturae et doctrinae et institutionis. ideo si navem a se fabricandam quis promiserit [*vel insulam aedificandam fossamve faciendam*]³ [*et hoc specialiter actum est ut suis operis id perficiat*], fideiussor ipse aedificans [*vel fossam fodiens*]³ non consentiente stipulatore, non liberabit reum. . . .

No one at the present day can have any doubt that

¹ The question how far "operae officiales" were individualised by the person of the patron to whom they were due, does not seem to arise here.

² As to whether this principle can be limited to "skilled" services, *vide infra*, p. 176.

³ "vel insulam . . . faciendam" and "vel fossam fodiens" seem to be glosses.

the passage "et hoc . . . perficiat" is due to the Compilers. Ulpian, arguing from the fact that artisans differ immensely in respect of skill, natural ability, education and training, lays down the rule that, without the creditor's consent, a fideiussor cannot validly perform a piece of work which his principal has undertaken; the fideiussor merely guarantees that the principal will perform and has no duty or right to perform himself. The Compilers, on the other hand, only admit this rule where it has been specially agreed that the principal shall carry out the work by his personal efforts. In other words they decline to recognise that *operae* are on principle individualised by the person of him who renders them; in a concrete case, indeed, they may be so individualised, in particular where it is agreed that a certain party shall render them personally.¹

If the foregoing argument be sound, then the substantial point in the restoration of δ is fixed, namely, that Julian denied the possibility of two smiths binding themselves correally to perform a piece of handicraft. As regards the details of restoration, I propose to substitute "tamen" for the initial "et," to insert "quamvis" before "eiusdem peritiae," to insert "nec" before "easdem," and change the "et" before "duo rei promittendi" into "nec." The meaning then is that (expert) services rendered by two smiths, even where the latter are of the same skill, are never deemed to be the same, and accordingly, even though two smiths make a formally unimpeachable correal promise to render such services, they are not deemed to be correal

¹ We shall see later (p. 235) that the Compilers, even if they had adhered to the classical rule regarding the passive individualisation of services, would have been perfectly justified, from the standpoint of the Justinianian law, in inverting Julian's decision in our present D. (45. 2) 5.

debtors. The "nec" inserted before "easdem" seems much preferable to Beseler's "inutiliter"; the point is that the respective services promised by the two smiths are materially incapable of being the same services—of identification. Finally we have only to insert "quamquam" or the like before "nihil prohibet" in γ , and our restoration of the two periods is complete.¹

We now turn to period α . Any attempt to give "alienae operae" another meaning than "operae to be rendered by a third party" seems out of the question, so that we have here an unmistakable antinomy with the classical law; cp., for example, Ulpian. D. (45. 1) 38 pr.: "nemo autem alienum factum promittendo obligatur," and Hermogenian. D. (46. 1) 65: "quia factum alienum inutiliter promittitur." Numerous attempts at restoration have been made,² but none of these can in my opinion be pronounced successful. It will be sufficient to note Mommsen's proposal, which Beseler follows, to insert "non" before "posse," and change "et" to "nec." In the first place, we observe that the words "in ea obligatione" assume the existence of a valid principal obligation, and in the second place, if the principal obligation be invalid, we ask, What classical jurist would have thought it necessary to deny the possibility of a fideiussor acceding to an obligation which does not exist?

My own suggestions regarding period α are as follows: (i) The word "alienas," in its present position, must be due to the Compilers; whether

¹ I do not think any real suspicion attaches to the word "intelleguntur" (δ) as here used; this remark is called for because of Justinian's predilection for the verbs "intellegi," "credi," "videri"; see Riccobono, ZSS., 43, p. 351.

² See Binder, p. 24, n. 59.

Julian wrote anything in the space now occupied by this word is altogether uncertain and does not concern us here.¹ (ii) I observe that the preliminary remarks of Julian in *a* were to all appearance intended to lay a foundation for a decision that *operae* could not be promised by two parties correally. (iii) Relying on D. (46. 3) 31 (cit.), I conjecture that Julian deduced the impossibility of such a correal promise directly or indirectly from the fact that a fideiussor could not, without the creditor's consent, validly perform the *operae* which his principal had promised.

I therefore reach the conclusion that the Compilers must have deleted a passage which formed the sequel to *a*; this conclusion is somewhat supported by the fact that, as the fragment stands, we should have expected period *a* to terminate with a verb, and not with such a phrase as "in ea obligatione." In the notes I have ventured a suggestion as to how this deleted period *β* may have run; if the same contained "alienas," it would be quite in accordance with the general methods of the Compilers to borrow this word for the purpose of an interpolation of *a*.

The explanation of the last mentioned interpolation need not cause us any serious difficulty. True, in *Inst.* III. 19. 21, Tribonian adhered to the classical rule: "qui alium facturum promisit, videtur in ea esse causa ut non teneatur, nisi poenam ipse promiserit." I cannot, however, believe that these words give an accurate representation of the living Justinian law; actually they seem to be little more than a historical reminiscence. Few Justinian lawyers, I venture to

¹ Discussion of this point would belong to a study on *Operae libertorum*, from which context the fragment is doubtless taken; "aliquas," "alicuius artificii," "alii (sc. quam patrono) eas," are possible conjectures, but my opinion as to the probability of any of them is reserved.

think, would hesitate to hold a promise of a *factum alienum* effective, even where no penalty had been added; that is to say, if M. promises T. that S. will perform a certain act and S. fails to do so, M. is, according to the view here suggested, liable in every case to pay T.'s *interesse*. Period *a*, as it stands, may therefore, in my opinion, be regarded as good Justinianian law. If our conjectures be sound, the motive for the introduction of "*alienas*" in this period is now evident, namely, to lay a foundation of sorts for the new rule that *operae* can be promised *correally*. If M. (and a *fideiussor*) can validly promise that S. will render certain *operae* and *vice versâ*, we can hardly prevent them making a *correal* promise of such *operae*.

The substantial soundness of our restorations being assumed, we now ask, What was the actual effect of a passive *correal* stipulation for *operae* under the classical law? Consider such a stipulation as:—

Titius: *Maevi, statuum aeneam Apollinis facere spondes?*

Sei, eandem statuum aeneam Apollinis facere spondes?

Ex hypothesis this stipulation cannot create *correality*, and on a strict application of civil law principles it must, we believe, be pronounced wholly "*inutilis*." But the language employed by Julian in period *δ* (as restored) seems clearly to imply that such a stipulation was not invalid. Well, if this be so, as partition is out of the question, only one result is possible, namely simple solidarity, and on principle we believe that this was the precise result which the classical jurisprudence must arrive at. Quite likely Julian after *δ* proceeded to explain this result, just as Gaius did in D. (45. 2) 15.

The only remaining question is whether the classical law excluded the possibility of correality in the case of all obligations for the rendering of services, or only where the services were of such a skilled nature that the personality of the workman made an appreciable difference. To this question no certain answer is possible in the absence of authority. We may point out, however, that it would be hard to draw the line between "individualised" and "non-individualised" services, and the probabilities are therefore not in favour of such a distinction being admitted by the classical jurisprudence. Accordingly we deem it safer to lay down one general rule that operae of any description are individualised by the person of him who performs them and cannot therefore be the prestation-object of a passive correal obligation.

The case of a passive correal stipulation containing a latent defect which induces material inequality of prestation is not mentioned in the sources. If such a case were to arise, no doubt the result would be simple solidarity likewise.

§ 24. **Authorities.** (§ 22 (B). **Contrasted Relations.**)

(1) D. (46. 2) 6 pr. Ulpian. XLVI. ad Sabin.

a. Si ita fuero stipulatus: "quanto minus a Titio debitore exegissem, tantum [*fideiubes*] < ~ > ¹?" non fit novatio, [*quia non hoc agitur ut novetur*].

¹ *fide tua promittis*. This seems a more likely restoration than *spondes*, for if Ulpian had used the latter word the Compilers would probably not have interfered with it. *Fidepromittere* is, of course, here used in the principal, not the accessory, sense; see Levy, *Sponsio*, p. 7 ff.

D. (45. 1) 116. Papinian. IV. quaest.

β. Decem stipulatus a Titio, postea, quanto minus ab eo consequi posses, si a Maevio stipularis, sine dubio Maevius universi periculum potest subire: sed et¹ si decem petieris a Titio, Maevius non erit solutus, nisi iudicatum Titius fecerit.²

γ. Paulus notat: non enim sunt duo rei Maevius et Titius eiusdem obligationis, sed Maevius sub condicione debet si a Titio exigi non poterit:

δ. [igitur *nec Titio convento Maevius liberatur (qui an debiturus sit, incertum est) et solvente Titio non liberatur Maevius (qui nec tenebatur, cum condicio stipulationis deficit), nec Maevius pendente stipulationis condicione recte potest conveniri.*]

ε. a Maevio [enim] < ~ + >³ ante Titium excussum non recte petetur.

D. (46. 3) 21. Paul X. ad Sabin.

ζ. Si decem stipulatus a Titio, deinde stipuleris a *Maevio*⁴ quanto minus ab illo consecutus sis,—etsi decem petieris a Titio, non tamen absolvitur *Maevius*⁴: quid enim si condemnatus Titius nihil facere potest?

η. sed et si cum *Maevio*⁴ prius egeris, Titius in nullam partem liberatur: incertum quippe est an omnino *Maevius*⁴ debiturus sit.

¹ Eisele, ZSS. 30, p. 142, deletes "et" by way of emendation—in my opinion wrongly.

² Eisele, l.c. (followed by Krüger, *Dig.*) attributes "nisi iudicatum Titius fecerit" to the Compilers, but I cannot by any means concur in this view.

³ igitur (from δ).

⁴ Paul and Celsus call the guarantor "Seius," but for sake of clearness I have preserved the name "Maevius" throughout.

θ. denique si totum Titius solverit, nec debitor fuisse videbitur *Maevius*,¹ [*quia condicio eius deficit*].²

D. (12. 1) 42 pr. Celsus VI. digest.

ι. Si ego decem stipulatus a Titio, deinceps stipuler a *Maevio*¹ quanto minus a Titio consequi possim,—si decem petiero a Titio, non liberatur *Maevius*,¹ alioquin nequicquam mihi cavetur: at si iudicatum fecerit Titius, nihil ultra *Maevius*¹ tenebitur.

κ. sed si cum *Maevio*¹ egero, quantumcumque est quo minus a Titio exigere potuero eo tempore quo iudicium inter me et *Maevium*¹ acceptum est, tanto minus a Titio postea petere possum.

These passages present to us the relation which we call that of principal debtor and independent guarantor by stipulation. As already indicated,³ the discussion which this relation caused seems undoubtedly due to the fact that the same did not easily fit in with the principles of the civil law.

In the first place we note that Ulpian, in period α, thinks it necessary to deny novatory effect to the second stipulation. The argument in favour of novation was specious. As Papinian says in β, “*Maevius universi periculum potest subire*”; is the position not then substantially that M. promises the same x as T. has already promised? The classical jurisprudence, however, rejected this argument,

¹ Paul and Celsus call the guarantor “*Seius*,” but for sake of clearness I have preserved the name “*Maevius*” throughout.

² Apparently a gloss; “*condicio eius*” (his condition = the condition of his obligation) is hardly possible.

³ *Supra*, p. 154 ff.

which, if accepted, would have rendered independent guarantee by stipulation impossible. The second obligation presupposes the continued subsistence of the first; moreover its prestation-object is an uncertain sum not exceeding x , while that of the first is a fixed sum of x .¹

In the second place, novation being thus disposed of, the question arises whether the relation of the two obligations is not necessarily one of formal accessorality. If this question be answered in the affirmative, *S.* is in the same position as a fideiussor and *litiscontestatio* has extensive consuming effect. Such a result would, however, essentially destroy the utility of the guarantee. I (the creditor) must be able to sue *T.* without losing my right of recourse against *M.*, should I fail to recover in full from the former. Otherwise, as Celsus says in ι , “*nequicquam mihi cavetur*,” the same idea being also apparent in Paul’s question in ζ , “*quid enim si condemnatus Titius nihil facere potest?*” Accordingly we are bound to treat the relation of *T.* and *M.* as governed by other principles than was the relation of principal debtor and fideiussor. It must be the existence of an accessorial relation that Paul in γ denies particularly with the words “*non enim sunt duo rei M. et T. eiusdem obligationis*”; in the absence of unity of originating cause no one would suggest that *M.* and *T.* were principal correal debtors.

In the third place, then, we ask, What precisely are the principles by which the relation in question is governed? If we could regard *T.* and *M.* as standing in a relation of simple solidarity, the position would be plain, but this solution is not available. The

¹ Cp. *supra*, p. 156.

reaction of the civil law against anything in the nature of solidarity without unity of originating cause was such that jurisprudence must abandon any attempt to establish the relation on an extensive solutio-consumption basis. Two methods of solving the problem are given by Celsus and Paul respectively.

The view of the older jurist Celsus is as follows :— The creditor can sue either T. or M. in the first instance. If he sues T., M. is not freed by process-consumption, but if T. satisfies the judgment, M. is under no further liability — “*nihil ultra tenebitur*” (period ι). In this latter case, Celsus, it will be observed, does not say that M. is “liberated,” as he would be if extensive solutio-consumption were to operate ; the words “*nihil ultra tenebitur*” mean that, to the extent of T.’s solutio, nothing is due under M.’s obligation at all—in fact the latter obligation is deemed never to have existed at all ; this result, as we shall see presently, is brought out with greater distinctness by Paul. Naturally the same result will take place if T. makes a voluntary solutio without being sued. On the other hand, if the creditor decides to proceed against M. in the first instance, T.’s resources must be evaluated as at the time of *litiscontestatio* in this action. Suppose it is ascertained that T. is able to pay vi of the sum of x due ; the creditor’s right against M. is then limited to the remaining iv, and quoad this iv his right against T. is consumed. Thus the debt is in effect partitioned as at the date of *litiscontestatio* with M. Such at any rate is my interpretation of the difficult period κ.¹

Paul agrees with Celsus in holding that *litis-*

¹ Cp. Bas. XXIII. 1. 44, and the relative scholia (Heimb. II., p. 640 ff.).

contestation with T. does not free M. (period ζ), and he brings out with greater clearness the result that if T. makes solutio, M.'s obligation is rendered non-existent ab initio—M. will not be deemed to have been a debtor at all (period θ).¹ But he denies Celsus's doctrine regarding the position where the creditor sues M. in the first instance. Litiscontestation in this action, he holds, does not liberate T. to any extent, because it is not yet certain whether M. will owe anything (period η). In other words M. cannot be condemned until T. has been discussed, so that if the creditor sues M. in the first instance, the proceedings must be hung up, until the discussion of T. is accomplished; if the creditor presses for judgment before the latter event, M. must be absolved. Hence Paul, in effect, deprives the creditor of his right of "electing" T. or M. in the first instance, and so does away with any suggestion as to their relation being solidary.

We have a very succinct statement of Paul's view in his note to Papinian D. (45. 1) 116 (periods γ to ε), if we eliminate the awkward gloss (period δ) with which this note has been encumbered.² According to

¹ Paul is not so exact in his choice of language in D. (46. 1) 71 pr.: "*quamvis enim iudicio convento principali debitore mandator non liberetur, tamen ubi successit creditor debitori, veluti solutionis iure sublata obligatione, etiam mandator liberatur.*" Solutio by the principal debtor, to which confusio is here assimilated, does not "liberate" the mandator in the technical sense of solutio-consumption, but renders his obligation non-existent ab initio: "*nec debitor fuisse videbitur*" (θ).

² From the substantial point of view period δ is quite harmless—in fact it has the merit of expressly resolving an ambiguity which lurks in the concluding words of β. Papinian says, "but if you sue T. for x, M. will not be 'solutus,' unless T. satisfies the judgment," the inference being that if T. does satisfy the judgment, M. will be "solutus." But in this latter case "solutus" must signify that M.'s obligation is rendered non-existent ab initio, and not, as might at first sight be thought, that M. is "liberated" in the technical sense of solutio-consumption. Period δ makes this plain: "*et solvente Titio non liberatur Maevius (qui nec*

my restoration, what Paul says is : " T. and M. do not stand in an (accessorial) *eadem res* relation, but on the contrary M. only incurs (principal) liability if the full amount cannot be exacted from T.; therefore M. cannot effectively (*recte*) be sued before T. has been discussed."

It will be observed that nothing is anywhere said as to the legal effect of *solutio* by M. on the obligation of T., but, on the analogy of what is laid down as regards the relation of principal debtor and mandator (*argentarius recipiens*),¹ we have no difficulty in holding that this effect is nil. T. remains at law under the same liability as before, and M., on making payment or even after payment has been made,² is clearly entitled to an assignment of whatever rights the creditor may have against him (T.).³

We may assume that the late classical jurists generally adopted the same view as Paul regarding the relation of principal debtor and independent guarantor by stipulation ; that is to say, by depriving in effect the creditor of his right of election, they

tenebatur, cum condicio stipulationis deficit)," Formal considerations, however, forbid us attributing δ to Paul. The whole period is awkward in the extreme, and we note particularly the following points : " *igitur* " standing first in its clause, which is always suspicious ; the scheme " *nec* "—" *et . . . non* "—" *nec* " ; the inelegant parenthetical constructions ; the harsh imperfect (*tenebatur*), and *cum* (apparently) causal + indicative (*deficit*) in the second parenthesis ; as the fragment stands, period ϵ purports to give a motive (*enim*) for the concluding passage of δ (*nec Maevius . . . conveniri*), but these two clauses merely express the same idea (observe the double "*recte*") in different words. Apparently, then, Tribonian or some commentator before him constructed period δ out of materials provided by D. (46. 3) 21 (periods ξ to θ). Beseler III., p. 63, 110, deletes ϵ as well as δ , but this restoration is too drastic.

¹ *Vide infra*, pp. 183 f., 191.

² Cp. Papinian. D. (46. 3) 95. 10 (next to be considered) : "*quamquam pecunia soluta sit.*"

³ Cp. *infra*, p. 184, n. 4.

excluded this relation from the sphere of solidarity altogether. Let us, however, suppose that this view had not been adopted, but on the contrary that the creditor's right of election had been preserved intact; in conformity with such supposition we further ignore the doctrine of Celsus that, if the creditor sues M. in the first instance, liability is in effect partitioned according to the state of T.'s resources as at the date of *litiscontestatio* in this action. On this hypothesis, therefore, the creditor can obtain judgment for the full amount from either T. or M. in the first instance. We ask, Is the relation of T. and M. then established on a solidary basis? This question, I believe, must be answered in the negative. Even if the classical jurists had taken up the view here suggested, they would, it is thought, have been bound to deny the operation of extensive *solutio-consumption*. *Solutio* by M. would still have no effect in "liberating" T., who remains legally bound as before, and *solutio* by T. would still not "liberate" M., but would render his obligation non-existent *ab initio*.

(2) D. (46. 1) 13.¹ Julian. XIV. digest.

Si mandatu meo Titio decem credideris et mecum mandati egeris, non liberabitur Titius: sed ego tibi non aliter condemnari debebo, quam si actiones quas adversus Titium habes mihi praestiteris. item si cum Titio egeris, ego non liberabor, sed in id dumtaxat tibi obligatus ero quod a Titio servare non potueris.

D. (46. 3) 95. 10. Papinian. XXVIII. quaest.
Si mandatu meo Titio pecuniam credidisses, eiusmodi contractus similis est tutori et

¹ Reproduced substantially in Gaius D. (17. 1) 27. 5.

debitori pupilli : et ideo mandatore convento et damnato, quamquam pecunia soluta sit, non liberari debitorem ratio suadet, sed et praestare debet creditor actiones mandatori adversus debitorem, ut ei satisfiat. et hoc pertinet tutoris et pupilli debitoris nos fecisse comparisonem : nam cum tutor pupillo tenetur ob id quod debitorem eius non convenit, neque iudicio cum altero accepto liberatur alter, nec si damnatus tutor solverit, ea res proderit debitori. . . .¹

Until Justinian altered the law by Novel 4 of the year 535, a creditor had a right of election as between a principal debtor and a mandator.² Yet, as the above passages show, the relation of principal debtor and mandator was not thereby established on a solidary basis.³ Solutio by the mandator does not liberate the principal debtor but entitles the former to an assignment of the creditor's rights against the latter,⁴ and it is further to be inferred that solutio by the principal debtor does not liberate the mandator but renders his obligation non-existent ab initio. Though the relation of principal debtor and mandator was, of course, unknown to the strict civil law, yet here again we see the principles of the latter making

¹ As to remainder of this paragraph see Partsch, *Negotiorum Gestio*, I., p. 62, n. ; Krüger, *Dig.*, App. IV.

² Cp. also Papinian. D. (17. 1) 56 pr.

³ It must ever be kept in mind that a *mandator pecuniae credendae* was formally a principal debtor, though from the material standpoint his liability was accessory to that of another ; the same remark applies to the *constituens alienae pecuniae debitae* and the *argentarius recipiens*.

⁴ If the creditor has obtained payment from the mandator, he will be precluded in equity from himself exacting a second payment from the principal debtor, but this equity cannot affect the mandator suing as the creditor's assignee ; cp. *infra*, pp. 191, n. 6, 321.

their influence felt by way of reaction against solidarity without unity of originating cause.

- (3) D. (13. 5) 18. 3. Ulpian. XXVII. ad edict.
 Vetus [*fuit*] < ~ >¹ dubitatio an qui < - >²
 hac actione [*egit*] < ~ >³ sortis obligationem
 consumat. et tutius est dicere [*solutione*
potius ex hac actione facta] < ~ >⁴ libera-
 tionem contingere, [*non litis contestatione*,]
 [*quoniam*] < ~ >⁵ solutio < - >⁶ ad
 utramque obligationem proficit.

In this celebrated passage from the title *de pecunia constituta* Ulpian was no doubt dealing primarily with the case where the debtor himself is the *constituens*, but this case and that where the *constituens* is a third party are governed by fundamentally the same principles. If we take the paragraph as it stands and apply its words to the case where the *constituens* is a third party, we seem to have, according to what is stated to be the "safer" view, an instance of simple solidarity without unity of cause. The principal and the "constitutory" obligations, of course, originate from different facts, yet extensive consuming effect is attributed to solutio though denied to *litiscontestatio*.

It may, however, be regarded as perfectly certain that Ulpian did not write this paragraph in its present form, though so far as I am aware no one has yet succeeded in proposing a tenable restoration. In the first place Seckel⁷ has drawn attention to the fact that the perfect "*fuit*" at the commencement

¹ *est*² *ex*³ *solvit*⁴ *per exceptionem doli potius quam ipso iure*⁵ *quamquam*⁶ *sortis*⁷ *Haftung de peculio in Aus röm. u. bürgerl. Recht* (Festschrift f. Bekker, 1907), p. 347, n. 4.

of the paragraph does not agree very well with the present "tutius est dicere," and he suggests that it was the Compilers who relegated the controversy to the past. I agree with this suggestion, and accordingly replace "fuit" by "est." In the second place, as the *actio de pecunia constituta* was a praetorian action in factum, it is inaccurate to speak of this action consuming, not merely the creditor's principal action right, but the principal obligation itself.¹ In the third place, it is impossible to believe that Ulpian used the harsh phrase "solutione ex hac actione facta"²; moreover, the word "potius," as the passage stands, is superfluous and indeed false. In the fourth place, we note the awkward tacking on of "non litis contestatione" to "liberationem contingere," which is quite in accordance with the methods of the Compilers. In the fifth place, the concluding motive "since solutio enure to the benefit of each obligation" apparently implies an antithesis to *litiscontestatio*; but such an antithesis is false from the classical standpoint, for *litiscontestatio* may equally enure to the benefit of each obligation, and in any event the argument involves a *petitio principii*, viz.: *solutione liberationem contingere, quoniam solutio ad utramque obligationem proficit*.

Now with a view to attempting a restoration of Ulpian's original text, let us at the outset ask ourselves, Is it at all likely that any "vetus dubitatio" existed on the question whether *litiscontestatio* in an *actio de pecunia constituta* consumed, directly or indirectly, the principal obligation? In my opinion it is highly unlikely that any serious doubt existed on this point at all. Process-consumption could only

¹ See Levy, *Konk.*, p. 64; cp. *supra*, p. 112 f.

² Seckel, l.c., n. 5, deletes "ex hac actione facta."

operate extensively if the constitutory obligation were treated as formally accessory to the principal obligation—in other words, assuming the constituens and principal debtor to be different parties, if the constituens were deemed to be in the same position as a fideiussor. Well, if a constituens had been deemed to be in this position, the classical law could hardly have excluded a *beneficium divisionis* as between several *constituentes*, but Justinian's enactment C. (4. 18) 3 shows that the latter were not accorded this benefit till the year 531. But quite apart from this special argument, I can have little doubt that the classical law did not regard a constitutory obligation as accessory in the formal sense. This obligation derived its force entirely from the praetorian law, and to treat it as standing in an *eadem res* relation with a principal civil law obligation would be quite anomalous. Hence I reach the conclusion that as between these two obligations process-consumption could never operate extensively, either *ipso iure* or *per exceptionem rei iud. vel in iud. ded.* True, if the creditor once sued on the principal obligation, the praetor might on equitable grounds refuse him a further action *de pecunia constituta* (or only grant the same subject to an *exceptio doli* or in *factum* which rendered it useless), and *vice versâ*, but this has nothing to do with civil consumption.

Let us then dismiss the idea that our present paragraph as written by Ulpian dealt with the question whether *litiscontestatio* in an *actio de pec. constit.* consumed the principal obligation. The main clue to what Ulpian actually did write seems to be found in the words "*solutione ex hac actione facta.*" If we eliminate the following reference to *litiscontestatio* (*non litis contestatione*), we at once perceive the

possibility that the question raised may have been, Did *solutio* under the constitutory obligation consume the principal obligation, so that if the creditor subsequently sued on the latter the iudex was bound ipso iure to pronounce an absolatory judgment? I have little hesitation in holding that this was the actual point on which the long standing doubt existed, and I therefore substitute “qui ex hac actione solvit” for “qui hac actione egit.”

Confining ourselves meanwhile to the case where the principal debtor and constituens were one and the same party, we see the point at issue to be as follows: Common sense seemed to favour the view that *solutio* made under the constitutory obligation—whether voluntarily or after action brought was on principle immaterial¹—ipso iure consumed the principal obligation likewise, though *litiscontestatio* had no such effect, but the principles of the civil law did not countenance such a result. In the converse case where payment was made under the principal obligation, the difficulty could be got over by holding that the constitutory obligation was not indeed consumed, but rendered non-existent *ab initio*. Payment under the constitutory obligation, however, clearly could not so affect the principal obligation.

How then did Ulpian solve the problem? Here the clue seems to lie in the word “*potius*,” which is quite impossible as it stands, but which, by the very reason of its impossibility, was in all likelihood found by the Compilers in the original text. Suppose Ulpian to have written “*tutius est dicere per exceptionem doli potius quam ipso iure liberationem contingere*,” and

¹ Ulpian, according to our restoration, only mentions the case where *solutio* was made after action brought (*qui ex hac actione solvit*), because, the principal debtor and the constituens being *ex hypothesi* one and the same, a voluntary payment would naturally be attributed to the sors.

the whole position becomes plain. Ulpian admits the force of the common-sense argument in favour of solutio-consumption, but nevertheless does not recommend any derogation from strict civil law principles. Indeed no such derogation was at all necessary, for an equitable exceptio doli would give the debtor ample protection. To complete our restoration we have only to substitute "quamquam" for "quoniam" and insert "sortis" after "solutio." The decision then runs as follows: "Solutio under the constitutory obligation is best regarded as endowed with merely an equitable consuming effect on the principal obligation, though solutio of the principal debt (legally) enures to the benefit of each obligation." As already indicated, payment under the principal obligation may quite reasonably be held to render the constitutory obligation non-existent ab initio, and Ulpian's avoidance, in the final clause, of any reference to consumption—he does not say "solutio sortis utramque obligationem *consumit*" — supports the conjecture that he thus construed the result of solutio sortis.

The substantial soundness of our restorations being assumed, the Compilers' manipulations of the paragraph need not cause any serious difficulty, familiar as we are at the present day with their extraordinary modes of operation. The classical distinction between civil law and praetorian equity being now obsolete, the whole question whether solutio under the constitutory obligation consumed the principal obligation was rendered trivial; hence we get the general rule "solutio ad utramque obligationem proficit." But, assuming always that the principal debtor and constituens are one and the same, does litiscontestatio under the one obligation consume the other? This question still remained

open, for Justinian's abolition of extensive process-consumption only applied in terms to the case where there were different parties on the debtor side. Now very probably Ulpian in a preceding context which the Compilers deleted, raised the question whether *litiscontestatio* had extensive consuming operation in the case before us, and gave a negative answer. The Compilers therefore, as we suppose, conceived the brilliant idea of making the present paragraph deal with this question and interpolated it accordingly.

Let us now glance at the case where the constituents and the principal debtor are different parties. If *solutio* were granted extensive consuming effect, then we should have a simple solidary relation without unity of originating cause. But by adhering, in accordance with Ulpian's advice, to strict civil law principles we avoid this result. *Solutio* by the principal debtor renders the constitutory obligation non-existent *ab initio*, while *solutio* by the constituents leaves the creditor's right against the principal debtor legally intact and capable of assignment to the constituents. Yet, under the classical law, the creditor had the right of electing either the principal debtor or the constituents, as appears from the fact that the constituents (*ἀντιφωνητής*¹) was expressly granted a *beneficium excussionis*, along with the fideiussor and the mandator, by Novel 4. In the problem presented by this case we can clearly observe the civil law antagonism to solidarity without unity of originating cause, though of course the relation of principal debtor and constituents was unknown to the *ius civile* itself.

The foregoing criticism and exegesis remove, I believe for the first time, all difficulty from our present paragraph. The result attained ought to be

¹ Wrongly translated "sponsor" in the *Collectio*.

specially acceptable to Levy,¹ for it eliminates one of the most serious obstacles to his theory of process-consumption, and enables us to adopt this theory with greater certainty.

(4) D. (17. 1) 28. Ulpian. XIV. ad edict.

Papinianus libro tertio quaestionum ait [*mandatorem debitoris*] < ~ >² solventem ipso iure reum non liberare (propter [*mandatum*] < ~ >³ enim suum solvit et suo nomine), ideoque [*mandatori*] < ~ >⁴ actiones putat adversus reum cedi debere.

This fragment comes from a context dealing with the actio recepticia,⁵ and I believe it must originally have referred to the receptum argentariorum. "Mandatorem debitoris" is hardly possible, as the debtor is immediately thereafter described as "reus." If my restoration be sound, then we have the relation of principal debtor and argentarius recipiens governed by precisely the same principles as the two relations last discussed. The creditor undoubtedly has a power of electing the debtor or the recipiens, but solutio-consumption does not operate; on the contrary, as is here stated, solutio by the recipiens does not free the debtor at law,⁶ and, as we must likewise hold, solutio by the debtor renders the receptum obligation non-existent ab initio. Here, again, we are entitled to trace the influence of the civil law reaction against solidarity without unity of originating cause. The parenthetical

¹ See *Konk.*, p. 64 f.

² *argentarium*

³ *receptum*

⁴ *argentario*

⁵ See Lenel, *Pal.* II., col. 492; ZSS., 2, p. 66 f.

⁶ The words "ipso iure" indicate (arg. e contr.) that equity will prevent the creditor from proceeding himself against the debtor after he has recovered from the recipiens; cp. *supra*, p. 184, n. 4; *infra*, p. 321.

clause "propter . . . nomine" is apparently intended to refute any suggestion that the recipiens is formally an accessory debtor; if he were so, then solutio (and also litiscontestatio) must have had an extensive consuming effect.

§ 25. Equitable Solidarity.

Equitable solidarity is the result produced where two obligations stand at law in a cumulative relation, but praetorian equity prevents the recovery of more than the full prestation due under one or other of them. For the sake of simplicity we shall confine our exposition to the passive case.

Legal cumulation being a condition precedent to equitable solidarity, the two obligations must originate from different causes, for a single contractual act cannot produce cumulative obligations in solidum. Accordingly we have here a relation in a sense converse to simple solidarity; the latter is a legal, not an equitable, relation, and the principles of the civil law exclude its existence without unity of originating cause.

The ground on which equity reduces a legal cumulative relation to one of solidarity is that it recognises both obligations as directed to the same juristic end, as based on the same material cause, as designed to fulfil the same economic interest. Whether in a particular case equitable relief will be granted on this ground, depends on the general principles of the *ius honorarium*, and, we must add, to some degree on the "conscience" of the individual praetor.

The most important question which arises is whether equity, in reducing a legal cumulative relation to one of solidarity, will treat solutio, or

its equivalent,¹ as the sole consuming agent, or will attribute a quasi-consuming effect to litiscontestatio also; in other words, Is equitable solidarity modelled after a simple solidary or a correal pattern? According to the maxim "Equity follows the (civil) law,"² we are probably justified in saying that as a general rule equitable solidarity admits something analogous to legal extensive process-consumption, though it is impossible to affirm that the praetor's hands were absolutely tied in this matter so as to prevent him doing substantial justice according to the circumstances of each concrete case.³

The normal sanction of equitable solidarity lies in the praetor's power of refusing actions and granting exceptions. The simplest mode of reducing a legal cumulative relation to equitable solidarity is for the praetor to refuse a creditor who has received payment from (or sued) one debtor, any further action against the other (praetorian consumption). But it will often be more convenient for the praetor, instead of himself deciding whether or not a further action should be granted, to grant the action subject to an exception, it being thus left to the iudex to admit an equitable consumption if he thinks fit (judicial consumption). If equitable solutio-consumption be pleaded, an exceptio doli will naturally be sufficient

¹ As to acceptilatio, cp. *supra*, p. 148, n. 3 (p. 149).

² We must, however, be careful in applying this maxim; cp. Mitteis, *Röm. Privatrecht*, I., p. 61: "The traditional legal principles (gewohnheitsrechtliche Sätze) were only gradually carried over from the institutes of the civil law to the parallel institutes of the praetorian law; for example, it was only with hesitation that the right of acquiring through a servus fructuarius was conferred on a usufructuary whose right was only protected by the praetor" (see D. (7. 1) 25. 7).

³ In the active case, where one of the co-creditors joined issue collusively or failed to prosecute the action duly, there was, as already stated (*supra*, p. 123), no reason why such creditor should not be deprived of his preference, and the other co-creditor allowed to sue.

for this purpose ; if equitable process-consumption be pleaded, an exceptio in factum modelled after the exceptio rei iud. vel in iud. ded. would seem more appropriate, though perhaps an exceptio doli would cover this case also. In the case of bonae fidei iudicia, however, we must always bear in mind the iudex's power of considering all points of equity without any exception, and also of refusing to pronounce a condemnation in the action unless the plaintiff relinquishes another action right. But into these details we cannot enter here.¹

The praetor's power of refusing actions and granting exceptions would enable him to give effect to the pure idea of "subjective alternativity."² For example, two obligations *decem a Maevio dari* and *domum a Seio aedificari*, both in favour of Titius, might in equity be treated as alternative in the sense that T. can claim fulfilment of either, but solutio (or litiscontestatio) under the one extinguishes the other entirely, though no "substantial equality of prestation" is here present.³ We may, however, conjecture that in such cases the praetorian law tended to cling as far as possible to the idea that solutio- and process-consumption can only operate as between prestations which are relatively equal. So, in the illustration given, the prestation *domum aedificari* might be valued in money, say at xv or x+v, and an equitable solidary relation deemed to exist between the two obligations *decem dari*, a simplex obligation *quinque dari* being left outstanding. Therefore, if the house be not duly built, T., after having recovered x from M., is still entitled to sue S.,

¹ See Biondo Biondi, *Iudicia bonae fidei* in *Annali del Sem. giurid. della R. Univ. di Palermo*, VII., p. 3 ff. ; cp. *infra*, pp. 246, n. 1, 319.

² *Vide supra*, p. 11 ff.

³ Cp. Gaius D. (45. 1) 141. 5.

but in this latter action the condemnation must be limited to v. Again, if T. has joined issue with M. (whether or not he has recovered anything under the action), and equitable extensive process-consumption operates, he (T.) is still entitled to sue S., but the condemnation must as before be limited to v. If this view be sound, we observe a difference between legal and equitable process-consumption. At law, every process-consumption relation must be *in toto*; if the two obligations *decem a Maevio dari* and *domum a Seio aedificari* were to stand in a legal process-consumption relation,¹ litiscontestation with M. in respect of x must consume T.'s right against S. in its entirety. Equity, on the other hand, may admit the possibility of a process-consumption relation between one obligation and a part of another, the remainder of the latter having an independent existence.

The foregoing principles will to some extent be illustrated in the following section by reference to D. (46. 2) 28. Meanwhile, however, let us consider a simple case of equitable solidarity: M. asks T. for a loan of x; T. agrees to make the loan but on one condition only, namely, that M. and a third party S. will promise, each independently of the other, to pay him x. The following stipulations are accordingly entered into:—

Titius : Maevi, decem dari spondes ?

Maevius : spondeo.

Titius : Sei, decem dari spondes ?

Seius : spondeo.

As a result of these stipulations M. and S. are, of course, cumulatively liable at law, but, as *ex hypothesi* only a single sum of x is lent, it would be contrary to

¹ Which, in point of fact, they could not do.

good faith for T. to exact more than a single sum of x; equity must recognise the juristic end, the material cause, the economic interest, as one and the same in the case of both obligations. Accordingly if, let us say, M. pays the full x due, and T. then attempts to sue S., the praetor will either refuse this latter action altogether or render it nugatory by means of an *exceptio doli*. But further, it would appear that in the ordinary case, if T. merely joins issue with M. in respect of the full x, he is precluded from thereafter suing S.; any subsequent action against the latter will either be refused, or be rendered nugatory by means of an *exceptio in factum* (in the nature of an *exceptio rei iud. vel in iud. ded.*) or, it may be, an *exceptio doli*.

§ 26. Authority (§ 25).

D. (46. 2) 28. Papinian. II. definit.

- a. Fundum Cornelianum stipulatus, quanti fundus est postea stipulor: [*si non novandi animo secunda stipulatio facta est,*] cessat novatio:
- β. secunda vero stipulatio tenet, ex qua non fundus sed pecunia debetur.
- γ. itaque si reus promittendi fundum solvat, secunda stipulatio iure non tollitur, nec si litem actor ex prima contestetur:
- δ. < - >
- ε. denique meliore [*vel deteriore*] facto [*sine culpa debitoris postea*] fundo, [*praesens aestimatio fundo petito recte consideretur, in altera vero*] < - >¹ ea aestimatio venit, quae secundae stipulationis tempore fuit.

In this fragment Papinian deals immediately with the case where the two stipulations are from the same

¹ in deductionem.

party, but the case where they are from different parties is governed by fundamentally the same principles. In the meanwhile let us confine our attention to the first of these cases.

Titius stipulates from Maevius: "fundum Cornelianum dari spondes?" and subsequently he stipulates from the same M.: " quanti fundus Cornelianus est quem mihi dare spondidisti, tantam pecuniam dari spondes?" Papinian denies that the second stipulation novates the first (α), obviously because the two prestations are juristically distinct though economically they may coincide¹; yet he thinks it necessary to uphold expressly the validity of the second stipulation (β). Then he draws the inference that neither solutio nor litiscontestatio under the first stipulation legally consumes the second (γ).

All this is highly instructive. It is evidently assumed that the juristic end, the material cause, the economic interest, is one and the same in the case of both obligations; perhaps the parties intended to achieve novation or else to give T. a choice of claiming either the estate itself or its pecuniary value, but they failed to take the proper means for carrying their intentions into effect. What is the result? Novation being excluded, the only alternatives are to hold the second stipulation ineffective, or else to treat the two obligations as co-existing cumulatively at law, and Papinian soundly decides in favour of the latter alternative. But equity is bound to prevent T. from exacting both the fundus and its value. The question is, How does equity operate?

Clearly, period ϵ cannot have been written by

¹ Cp. Ulpian. D. (45. 1) 82 pr., where a res and its pretium are similarly distinguished. It is unnecessary now to argue that the passage "si non novandi . . . facta est" must be interpolated.

Papinian as it stands. We note the following formal defects: "Sine culpa debitoris" can only refer to "deteriore," while grammatically it should refer to "meliore" also; "postea" is in a false position, and the point of time to which it refers is not stated; "fundo petito" following so close on "facto . . . fundo" is inelegant; the present subjunctive "consideretur" cannot possibly have been written by a classical hand; there is nothing with which "altera" can agree. We further note the elementary nature of the point dealt with. The action on the second stipulation is an *actio ex stipulatu* in which, by virtue of the words of the stipulatory formula "*quanti fundus est*," the value of the *fundus* obviously must be taken as at the date of this stipulation. The action on the first stipulation is a *condictio certae rei*, and the value of the *fundus* for purposes of condemnation must, of course, be taken as at the date of *litiscontestatio*¹ in this action.

The clue to the restoration of period ϵ lies, I think, in the phrase "*ea aestimatio venit*," which seems to call for "*in deductionem*."² If, then, from the preceding part of the period we eliminate everything but "*denique meliore facto fundo*," we seem to have the case where the *fundus* has increased in value since the date of the second stipulation; T., in suing for the *fundus* under the first stipulation, can, it is held, only recover its present value less its value at the date when the second stipulation was con-

¹ See Lenel, *Edict.*, p. 233.

² True, "*venire in deductionem*" does not occur in any recorded text; but in Javolen. D. (16. 2) 14, apparently the Compilers have substituted "*compensationem*" for "*deductionem*" in the phrase "*in compensationem non veniunt*"; "*venire in compensationem*" also occurs in Ulpian. D. eod. 6; in *Gai.* IV. 66, 67 we have "*in compensationem vocari*," "*in deductionem vocari*."

cluded. But such deduction of the value of the fundus as at the date of the second stipulation is intelligible on one assumption only, namely, that T. has already joined issue for this value under the second stipulation; if T. had recovered anything under the second stipulation without action, the amount to be deducted in a subsequent action on the first stipulation would be the sum actually recovered. Thus we get the position that T. first of all sues on the second stipulation, then, finding that the fundus has increased in value since the date of the latter, he sues on the first stipulation. Under such circumstances the decision in ϵ (as restored)¹ is that T., whether or not he has realised anything by his original action, can in this fresh action only recover the present value of the fundus less its value as at the date of the second stipulation.

Here we see equity operating by means of extensive process-consumption to prevent cumulation. At law T., though he has already joined issue under the second stipulation, is still entitled to recover the fundus or its full present value under the first stipulation, but equity restricts his right as aforesaid. T. must submit to a limitation of the *condemnatio* in the formula of the subsequent action under the first stipulation, otherwise this action will be refused altogether or will be rendered nugatory by means of an exception (*doli, in factum*).

Now it will be observed that period γ and period ϵ (as restored) deal with opposite situations,² and that

¹ Our restoration of this period does not pretend to be more than partial.

² That is to say, in γ T. has, in the first instance, sued on the first stipulation (or M. has made a voluntary *solutio* of the fundus itself under the latter); in ϵ (as restored) T. has, in the first instance, sued on the second stipulation.

we have no decision as to the equitable result in the two cases indicated in γ , that is, (i) where M. has made a voluntary solutio of the fundus, *i.e.*, under the first stipulation, and (ii) where T. has joined issue under the first stipulation; nor again (iii) have we any reference to the case where M. has made a voluntary payment under the second stipulation. It would appear, then, that only a fragment of Papinian's original decision has been preserved, and that of this decision period ϵ , as indicated by the particle "denique," formed the conclusion. Accordingly we have little hesitation in holding that something has been deleted between γ and ϵ .

The substance of this deleted passage (period δ) we can restore with practical certainty. Papinian must have laid down:—(i) If M. has already made a voluntary solutio of the fundus, *i.e.*, under the first stipulation, and T. now sues on the second stipulation, he (T.) can in equity recover only the amount, if any, by which the value of the fundus as at the date of the second stipulation exceeds its present value, though at law he would be entitled to recover its full value as at the date of the second stipulation. But clearly if T., having obtained the fundus, lets it depreciate through his own culpa, equity will not allow him to recover anything at all in respect of such depreciation.¹ (ii) If T. has already joined issue under the first stipulation (it is quite immaterial whether he has or has not realised the fundus or any part of its value by this action), and he now sues on the second stipulation, he can in equity recover only the amount, if any, by which the value

¹ Here, probably, we get the origin of the reference to culpa in period ϵ as it stands; apparently, however, the Compilers have substituted *culpa debitoris* for *culpa creditoris*.

of the fundus as at the date of the second stipulation exceeds its value as at the date of the previous *litiscontestatio* under the first stipulation, though at law he would be entitled as aforesaid. (iii) If M. has made a voluntary payment under the second stipulation, and T. now sues on the first, he (T.) can, in equity, recover only the amount, if any, by which the present value of the fundus exceeds the sum so paid, though at law he would be entitled to recover its full present value. Then followed period ϵ as partially restored by us.

Of course, all this distinction between law and equity was antiquated from the Justinianian standpoint, and we have therefore no difficulty in understanding the Compilers' action in eliminating Papinian's argument, and giving us merely a banal statement as to the different bases of valuation in the two actions. Fortunately, however, they just left sufficient of the original text to enable us to see what Papinian was aiming at.

If we now assume that the two stipulations were from different parties—that T. first stipulates from M. : "*fundum Cornelianum dari spondes?*" and then stipulates from S. : "*quanti fundus Cornelianus est quem Maevius mihi dare spondit, tantam pecuniam dari spondes?*" — the same principles are applicable as before. At law the result is cumulation, but equity will in the manner explained prevent T. from exacting more than the full amount due under the more profitable stipulation.¹ Here, then, we have equitable solidarity between the less profitable obligation and an equal part of the more profitable one. But further the equitable solidarity thus established is based on a correal pattern, for an extensive

¹ Assuming, of course, that accumulation was not really intended.

consuming effect is attributed to *litiscontestatio* as well as to *solutio*. Even in equity the formal and artificial conceptions of the civil law make their influence felt. *Solutio*-consumption without process-consumption remains a singular result only to be admitted where *dira necessitas* so compels.

§ 27. Solidarity through Reciprocal Conditions?

We have now to consider the question whether the classical jurisprudence admitted the establishment of solidarity by means of separate stipulations containing reciprocal conditions? This question is suggested by the following fragment:—

D. (45. 1) 9. Pomponius II. ad Sabin.

Si Titius et Seius separatim ita stipulati essent :
“fundum illum si illi non dederis, mihi dare spondes?”, finem dandi alteri fore quoad iudicium acciperetur, et ideo occupantis fore actionem.

The second book of Pomponius ad Sabinum dealt with testament, and this reference to stipulation was doubtless introduced by way of analogy to a legacy bequeathed thus: “fundum Cornelianum si heres meus Titio non dederit, Seio dato, si non Seio dederit, Titio dato.”¹ The debtor (heir), by making *solutio* of the fundus (or its value) to one of the creditors (legatees), say S., before the other, T., has joined issue, thereby escapes all further liability to T. But if T. joins issue before *solutio* is made to S., the principle “*melior est condicio occupantis*” applies, and no subsequent *solutio* to S. has any effect on T.’s right to judgment and execution.

¹ Lenel, *Pal.*, II., col. 89, places our present fragment in the middle of D. (30) 8. 1.

Here at first sight it would appear as if T. and S. were legal correal creditors, but in the absence of unity of originating cause, any such idea must be dismissed. At law, we may be certain, *litiscontestatio* by the one does not consume the right of the other. Actually the legal position seems to be as follows: If, before T. joins issue, the debtor makes *solutio* to S., T.'s obligatory right disappears by virtue of the failure of the negative condition to which it is subject, and vice versâ; but, on the other hand, until the debtor makes *solutio* to S., T. is entitled to bring an action, and at law this right is in no way prejudiced by the fact that S. has already joined issue, and vice versâ. If, then, the fact of S. having already joined issue is held to exclude a subsequent action by T., and vice versâ, as the concluding words of the passage "*occupantis fore actionem*" clearly imply, this can only be the result of equitable intervention.

But, having thus disposed of the idea that T. and S. stand in a legal correal relation, we must now ask ourselves whether the relation here figured falls under the category of simple solidarity as understood by the mature classical jurisprudence. In my opinion this question must be answered in the negative. Certainly, as already pointed out, if, before T. joins issue, the debtor makes *solutio* to S., T.'s right disappears through failure of the negative condition to which it is subject; but this result is altogether different from extensive *solutio*-consumption. What the *solutio* to S. here does is to render T.'s right non-existent *ab initio*, whereas extensive *solutio*-consumption implies the extinction of a right whose existence is (or may be deemed to be) perfect.¹ But further, as already observed, until the debtor makes *solutio*

¹ Cp. *supra*, p. 155, n. 2.

to S., T. is entitled to bring an action, and at law this right is in no way prejudiced by the fact that S. has already joined issue. Hence, so far as the rules of the civil law are concerned, we may have the case where both T. and S. bring independent actions for the fundus. Now observe the result in this case. If, at the time when T. joins issue, the debtor has not already made solutio to S., no subsequent solutio made to S. can have any legal effect in excluding T.'s right to judgment and execution, and vice versâ. Litiscontestation is the point of time for determining whether the negative condition to which each particular obligation sued on is subject, has or has not been fulfilled; the principle, "omnia iudicia sunt absolutoria,"¹ can have no application here. Therefore, if at the date of litiscontestation by T. solutio has not already been made to S., and vice versâ, the legal result is cumulation.

Such a result would, however, be quite contrary to the intentions of parties (the testator), and the praetor therefore intervenes to prevent it. His *modus operandi* is to admit an "equitable extensive process-consumption," so that when T. occupies by litiscontestation, no further action will be granted to S.,² and vice versâ. By this means, in the case where an application of civil law principles would lead to cumulation, equity reduces the relation to one of solidarity. The nature of the reciprocal conditions clearly points to an identity of juristic end which equity is bound to recognise.

Our present D. (45. 1) 9, owing to its fragmentary nature, gives, I believe, but a scanty indication of Pomponius's original argument. Apparently, how-

¹ *Gai.* IV. 114; *Inst.* IV. 12. 2.

² Or will be granted subject to an *exceptio doli* or in *factum* which renders it nugatory, *vide supra*, p. 193 f.

ever, the equitable process-consumption implied in the concluding words, "occupantis fore actionem," was deduced from the ineffectiveness of a solutio made to the one creditor after the other had joined issue. Under the civil law, indeed, if T. joined issue and the debtor then made solutio to S., such solutio, while quite ineffective as a ground of absolution in T.'s action, operated as a valid discharge of the debtor's liability to S., and could not be "repeated." The position here is that the solutio of the fundus to S. stands, but over and above the debtor must make a solutio of its value to T., so that he incurs a cumulative burden. In such a case, however, equity must have afforded the debtor, at any rate where he had made the solutio in bona fide error, a means of recovering the fundus from S., with the result that the solutio was rendered ineffective from every standpoint. Therefore, S.'s right to receive the fundus at all, after T. has joined issue, being in equity denied, it follows that he (S.) can in equity have no further right of action against the debtor.

We thus reach the conclusion that, so far as the case figured by Pomponius has solidary features, these are entirely equitable, not legal. The principles by which this case is governed are applicable to all other cases of obligations ex diversis stipulationibus subject to reciprocal conditions, which cases the reader may be left to work out for himself. We, therefore, have full confidence in affirming that it was quite impossible to establish a legal solidary relation without unity of originating cause by any such device as is here contemplated.¹

¹ Compare with the results here attained the case of separate mandates directed to the same juristic end, *infra*, p. 317 ff.

CHAPTER IV

SOLIDARITY EX STIPULATU UNDER THE JUSTINIANIAN LAW

§ 28. Justinianian Solidarity, Joint and Several.¹

IN passing from the classical to the Justinianian law we feel ourselves entering, as it were, a new world. The expositions of the great Roman jurists, supplemented by authoritative decisions of the Roman emperors, still form the basis of the legal system, but the atmosphere of the living law is entirely fresh, the doctrines and rules of the classical jurisprudence being now largely modified through the influence of post-classical ideas and usages.²

The contrast between the classical and the Justinianian systems is nowhere more marked than in the realm of stipulation.

In the first place stipulation was no longer a formal act. Leo's constitution C. (8. 37 (38)) 10 of the year 472, enacting that all stipulations might validly be concluded "non sollemnibus vel directis sed quibuscumque verbis pro consensu contrahentium," endowed any agreement, made verbally between two parties

¹ As regards the following exposition I have to acknowledge special indebtedness to Riccobono, *Stipulatio ed Instrumentum nel Diritto giustiniano*, in ZSS. 35, p. 214 ff. and 43, 262 ff.

² To a certain extent these ideas and usages were of Greek origin, but we must be careful not to exaggerate the Hellenic or Hellenistic elements in the Justinianian law; see Riccobono, ZSS., 43, p. 378 f.

present together (*inter praesentes*), with the force of a stipulation. This degeneration of the *stipulatio* is of the highest significance. Previously the primary element in every stipulatory act was the interrogatory, which must formally contain the whole terms of the prospective contract. Now no interrogatory at all is required; any oral expression of consent constitutes a binding agreement. Accordingly when we read in the *Corpus Iuris* of an interrogatory and response, we must, from the Justinianian standpoint, interpret such reference in one or other of two ways: (i) We may regard it as a mere survival from a bygone system and devoid of all significance for the new law; or (ii) we may regard it as containing a theoretical analysis of the contractual act; just as we are accustomed to analyse contracts, however concluded, into an offer and acceptance, so we may imagine that the Justinianian lawyers, following the model of the classical *stipulatio*, made use of an analysis into interrogatory and response. But if we adopt this second view, we must observe that the interrogatory now signifies nothing more than a proposal, however informal, by the creditor that the debtor shall accept liability, and the response now signifies nothing more than a final acceptance, however informal, of liability by the debtor. We must further observe that cases can be quoted where the Compilers of the *Digest* seem to have deleted references to an interrogatory,¹ and certainly they use the verb “*respondere*” absolutely, that is, without previous mention of an interrogatory, to denote the undertaking of an obligation.²

In the second place, Justinian by his constitution C. (8. 37 (38)) 14 of the year 531, gave almost every

¹ Cp. D. (45.2) 6. 3 (η) (*infra*, p. 221 ff.), and eod. 12 pr. (α) (*infra*, p. 223 f.).

² See passages cited in last note and eod. 3 pr. (β) (*infra*, p. 219 f.).

written contract the force of a stipulatio by means of a presumption that an oral agreement *inter praesentes* had been concluded. This constitution is somewhat difficult to follow, owing, it would appear, to the Revisers of the Code having touched it up in rather a clumsy manner. Its actual provisions, as set forth in the revised Code, seem to be:—

(i) If a written contract purports to have been made by a slave of the creditor with the debtor, it is presumed absolutely, no rebuttal whatever being admitted, that the slave mentioned belonged to the creditor and did actually stipulate for the debtor;

(ii) If a written contract purports to have been made by the creditor personally with the debtor, a presumption is raised that a stipulation was concluded, but this presumption can be rebutted in one way, though in one way only, namely, by clear proof that either the creditor or the debtor was absent from the town where the written contract was drawn up, during the whole day when it was drawn up. Thus a written contract which mentioned the creditor as stipulator was liable to be declared void on the ground of “*absentia*” in the sense just explained. By inserting the name of a slave as stipulator, however, the creditor entirely avoided this risk.

In such way and to such extent the Justinianian stipulation “absorbed” the literal contract of the Eastern provincial customs which were based on Greek law.¹ This absorption was, however, only theoretical. From the practical standpoint, whenever a contract was concluded in writing, the real constitutive cause of obligation was the written instrument itself and not any presumed oral agreement *inter*

¹ See Riccobono, ZSS., 43, p. 306, 326 ff.

praesentes; the presumption of an oral agreement was a mere legislative expedient and beyond this it had no value whatever. Moreover, even in theory, the Hellenic written document continued to be, under the Justinianian law, a constitutive cause of obligation and so a proper litteral contract, in certain special cases where the presumption of an oral agreement inter praesentes did not hold good. Thus, in *Inst.* III. 21, we have a proper litteral contract where a written acknowledgment of a loan is made “cessante verborum obligatione.”

The following question now arises: Suppose a written contract purports to be the record of an oral stipulation—in other words, contains a *clausula stipulatoria*¹—but it is proved that the requirement of C. (8. 37 (38)) 14 as to the presence of both parties in the same town has not been fulfilled, can the contract receive effect as a *litterarum obligatio* proper, the latter being, of course, quite independent of the said requirement? In my opinion this question should be answered in the negative; a document which purports to be the written record of an oral stipulation must be valued entirely in accordance with the Justinianian law of stipulation, and if when so valued it is found to be inept, we cannot then turn round and attempt to construe it as a litteral contract proper. This view, if sound, affords a satisfactory explanation of one point in connection with D. (45. 2) 8, considered as an exposition of Justinianian law, as will be seen in our next section.

Under the Justinianian law, then, a stipulation may, from the practical standpoint, be a written as well as an oral act, and, having regard to the universal employment of writing for legal purposes in the East,

¹ With the creditor personally mentioned as stipulator.

we must consider an unwritten stipulation as exceptional. Nevertheless the Compilers of the *Digest*, in their manipulations of the classical texts, continued for the most part to treat the stipulation as theoretically oral.

When a stipulatio was concluded in writing, none of the formal requisites above described¹ had any application — presence of the parties in the same town cannot be regarded as a formal requisite; when it was concluded orally, the requisite of “*praesentia*” alone held good in reality. Yet the Compilers did not eliminate the other formal requisites,² but sought rather to adapt them to the spirit and principles of the new law. In particular we must observe how they dealt with the requisite of *continuus actus*.

In our opinion, the requisite of *continuus actus*, as laid down by the mature classical jurisprudence, was made up of two rules, viz., “continuous presence” and “abstention”; provided these two rules were observed, the elapse of an interval between the different stages of the act did not matter, but if either of them was broken, the act became wholly or partially void.³ Now, obviously this requisite could have no possible application in the case of a written stipulatio, and we must therefore assume that the Compilers, in dealing therewith, had before their eyes a stipulatio concluded orally. Their mode of manipulating the requisite in question was as follows:—The rule of “continuous presence” they modified so as to allow a “*modicum intervallum*,” during which

¹ *Supra*, p. 87 ff.

² Except that relating to the use of “*spondere*”; this requisite became obsolete in the post-classical period, after Roman citizenship had ceased to have any real significance.

³ *Vide supra*, p. 90 ff.

the parties might separate,¹ to come between different stages of the act; and the rule of "abstention" they modified so as to allow any party to perform, between different stages of the act, a "*modicus actus non contrarius obligationi*." The vague nature of these provisions clearly betrays their utter impracticability; who is to define a "*moderate interval*" or a "*moderate act not contrary to the obligation*"?

On the other hand the Compilers, by way of set-off to their attrition of the classical rules of continuous presence and abstention, introduced a new rule, not found in the juristic writings, namely, that the answer(s) must be given on the same day as the question is put. Under the mature classical jurisprudence, provided the parties did not separate and each abstained from all other business, there was in our opinion no theoretical objection to an answer being given a week after the question had been put, though of course any such case was entirely unpractical. There is little difficulty in conjecturing where the Compilers got the idea of their "*idem dies*" rule, namely, in the words of C. (8. 37 (38)) 14. 2: "*si tamen in eadem civitate utraque persona in eo die commanet, in quo huiusmodi instrumentum scriptum est.*" Here the stipulatory act is presumed to have been commenced and ended within the limits of a single day, to wit, the day on which the written instrument was drawn up.²

One of the most important innovations made by Justinian on the classical *ius stipulationis* was in the matter of novation. By a constitution of the year

¹ It was not the admission of an *intervallum per se*, but the admission of an *intervallum* in which the parties might separate, that in our opinion constituted the derogation from the classical law.

² Cp. Riccobono, ZSS., 35, p. 252 ff., particularly p. 254.

530, C. (8. 41 (42)) 8, this emperor provided that novation should henceforth operate by virtue only of the express intentions of parties to this effect, and not by force of law. If a promise were made which in ancient times would have had *ipso iure* novatory force, the obligation created by such promise and the prior obligation were henceforth to co-exist side by side, unless the parties explicitly declared that the prior obligation was to be remitted and the later one to take its place : (pr.) “sancimus . . . nihil penitus priori cautelae innovari, sed anteriora stare et posteriora incrementum illis accedere, nisi ipsi specialiter remiserint quidem priorem obligationem, et hoc expresserint quod secundam magis pro anterioribus elegerint.”

It is to be observed, however, that to all appearance the classical law of novation had undergone a considerable degeneration before Justinian's time. In § 1 of the same constitution the Emperor says : “et generaliter definimus voluntate solum esse, non lege, novandum, etsi non verbis exprimatur ut sine novatione, quod solito vocabulo ἀνοβατεύτως dicunt, causa procedat.” These words seem clearly to infer that before 530 parties could always exclude novation by an express agreement to this effect ; and if such be the case, all Justinian did was to reverse the rule in the sense that novation should not now take place unless expressly provided for. But, in our opinion, under the classical law novation could not be excluded by agreement merely, except in certain special and well defined cases.¹ Again, the representation of the pre-existing state of the law given in *Inst.* III. 29. 3a

¹ Notably, where it was desired to take a sponsor or fidepromissor bound separately from the principal debtor, which case will be discussed in my treatise on Accessoriality ; cp. *supra*, p. 51, n. 3.

cannot be altogether reconciled with the rules of the classical jurisprudence on the subject, and seems to imply a post-classical development.

We now turn to the mode of constituting solidary relations under the Justinianian law. Needless to say, such a thing as a classical correal stipulation was to all intents and purposes unknown in Justinianian practice, though fortunately the Compilers of the *Institutes* thought it worth their while to set forth the ancient form for the benefit of students. As stipulation now depends for its force essentially on the consensus contrahentium,¹ the constitution of a solidary relation ex stipulatu is based on this same material fact of consent. An important point must, however, here be noted. As a result of Justinian's constitution C. (8. 41 (42)) 8, if, for example, M. owes x to T., and S. promises T. the same x as M. owes but nothing is said as to novation, S. becomes a solidary debtor with M., even where the latter does not know or does not approve of S.'s promise.²

The case last mentioned suggests a distinction between two forms of Justinianian solidarity:—

(i) Where the solidary relation is constituted by the common consent of all the parties on the one side or the other; this we shall call "Justinianian joint solidarity" or "Justinianian correality." The jointness of the relation here depends on the communis consensus entirely; it is of no consequence whether the different obligations are created by one act or several—whether all are created simultaneously or one after the other—provided always each creditor

¹ We here ignore the element of material cause; see Riccobono, ZSS., 43, p. 287 ff., 395 ff.

² Apparently the same result took place under the post-classical law before 530 if novation were expressly excluded.

or debtor consents to the accession of the others. Active solidarity *ex contractu* can only be joint in the present sense, because, within the sphere of contractual obligations at any rate, one creditor cannot have another solidary creditor joined to him without his knowledge and consent.¹

(ii) Where one debtor being already bound, another solidary debtor is added without his (the first debtor's) knowledge or consent ; this we shall call "Justinianian several solidarity."

This distinction between joint and several solidarity may be utilised by the law for a number of purposes ; for example, a *beneficium divisionis*, or mutual rights of regress independent of any inner relation or of *cessio actionum*, may conceivably be admitted as between joint, but not as between several, solidary debtors. Justinian's constitution C. (8. 39 (40)) 4 (5), which permitted an interruption of prescription occurring in favour of (or against) one solidary creditor (or debtor) to enure to the benefit (or prejudice) of all, deserves attention in this connection, for the language here employed is applicable only to the case of joint solidarity : (§ 1) "in uno eodemque contractu" ; (§ 3) "cum ex una stirpe unoque fonte unus effluxit contractus vel debiti causa ex eadem actione apparuit." Likewise we believe the provisions of Novel 99 to be applicable only to joint solidarity.²

It is with Justinianian joint solidarity or *correality* that we are mainly concerned, several solidarity presenting no difficulty.

If a Justinianian *correal* relation is to be constituted by written act, the normal course will be for

¹ Such an event could only happen by virtue of a special legal disposition in the case of obligations not arising from express contract.

² *Vide infra*, p. 239.

a single document to be drawn up embodying the whole transaction. The only point that requires attention here is the possibility of the contract being declared wholly or partially void on the ground of "absentia," within the meaning of C. (8. 37 (38)) 14. Suppose the document attests a correal stipulation made by the creditor T. personally with the co-debtors M. and S., and it is proved that either T. or both M. and S. were absent from the town where the document was drawn up, during the entire day when it was drawn up, the contract will be wholly void. If it is proved that one of the debtors alone, say M., was so absent, the contract will be void so far as he is concerned, but a valid simplex obligation will be created between T. and S.

There was, however, nothing to prevent a correal relation being established by means of separate documents forming part of the same transaction. Here, then, we have the possibility of T. resident, say, at Constantinople stipulating correally from M. resident, say, at Rome and S. resident, say, at Carthage, purely by means of written documents. As we have seen, if a slave of the creditor were inscribed as stipulator, the presumption in favour of the due conclusion of a stipulation was absolute. All that T. then has to do in order to take M. and S. bound correally is to get M. to send him a document stating "*Sticho Titii servo stipulanti ego Maevius et Seius promissimus singuli in solidum, ita ut duo rei promittendi fieremus*" or the like,¹ and

¹ Cp. Papinian. D. (45. 2) 11. 2 (*supra*, p. 37), where the cautio quoted has clearly been made by Antoninus Achilleus alone, though Iulius Carpus is mentioned as a co-promisor. In the case of the present document, I have made the clausula stipulatoria contain both the phrases "*singuli in solidum*" and "*ita ut duo rei promittendi fieremus*." This is the full form given by Papinian in the passage cited, but no

to get S. to send him a corresponding document. Here the intentions of parties to create correality are manifest, and as no proof is admissible that the agreement was not actually made *inter praesentes*, we must hold a correal relation to be duly established. In such a case it is perfectly natural to say that T. has taken M. and S. bound as correal debtors "*ex diversis locis*," *i.e.* "from" Rome and Carthage, the precise form of expression which we find in D. (45. 2) 9. 2 (*itpd*).¹

In the next place let us suppose that a correal relation is to be created orally. Here it is necessary for the single party on the one side (T.) to meet with each of the parties on the other side (M. and S.), but on principle there does not seem any necessity that M. and S. should themselves meet, provided each intends to bind himself correally with the other. The Compilers, however, for the purposes of their expositions, proceed on the basis that all three parties meet to conclude a single joint act, which may be analysed theoretically into "interrogatory" and "response,"² like a classical correal stipulation.

Finally we must observe that until Justinian altered the law by Novel 99 of the year 539, the question whether two joint debtors were liable *singuli in solidum* or *pro rata* depended solely on the intentions of parties. Even where a document attested a simple joint stipulation only, *e.g.*, "Titio doubt either of these phrases alone would indicate sufficiently an intention to create correality—or, to express the matter accurately from the classical standpoint, would attest sufficiently the conclusion of a correal joint oral stipulatio. So, in Pomponius D. (30) 8. 1 (*supra*, p. 145), we find the words "*quasi si duo rei promittendi in solidum obligati fuissent*," though the expression "*duo rei promittendi*" itself connotes solidarity.

¹ *Vide infra*, pp. 224 f., 266, 282 ff.

² *Vide supra*, p. 207.

stipulanti Maevius et Seius promiserunt," it was open to the creditor to prove that the creation of solidarity had actually been intended. This rule is perfectly intelligible. Under the classical law, if a cautio stipulatoria were in the above form, and hence, according to Papinian. D. (45. 2) 11. 2, afforded evidence of pro rata liability merely, the creditor was quite entitled to prove by other evidence that a distributive form of joint oral stipulation had actually been employed, and solidarity therefore established. And so, under the Justinianian law, where the intentions of parties had in this matter taken the place of stipulatory forms, proof as afore-said was admissible. The same principles must have applied in the case of an active joint contract also.

The remainder of this chapter is distributed as follows :—

In the next section (§ 29) we shall illustrate the foregoing observations from certain interpolated texts. Then (§§ 30 and 31) we shall deal with and illustrate Justinian's abolition of extensive process-consumption. Finally (§ 32) we shall consider Novel 99.

§ 29. Authorities (§ 28).

(1) D. (45. 2) 8. *Supra*, p. 44 ff.

We have now to interpret this fragment as an exposition of Justinianian law.

In the first place we observe that the document contains a clausula stipulatoria, which fact excludes the idea of a literal contract proper; hence the provisions of C. (8. 37 (38)) 14 must apply.¹

In the second place it is essential to assume that

¹ *Vide supra*, p. 209.

“you the stipulans” are the actual creditor and not a slave acting on his behalf. Had the *clausula stipulatoria* run: “. . . stipulanti tibi, Sticho Titii servo, . . .,” the validity of the contract could not, in my opinion, have been challenged on any ground of “*absentia*.”¹

In the third place it is essential to assume, not merely that one of the debtors, say M., was not present when the document was made, but that he can be proved to have been absent from the town where, during the whole day when, it was made.² On the other hand, it must equally be assumed that M., in spite of his absence on this occasion, had actually consented to the transaction, otherwise, of course, there could be no suggestion of his being bound at all.

In the fourth place we note that the question whether the debtors, M. and S., are, assuming the contract to be formally valid, rendered liable *singuli in solidum* or merely *pro rata*, depends entirely on the intentions of parties (*quid inter contrahentes actum sit*). The terms of the *clausula stipulatoria*, indeed, serve merely to establish a simple joint contract leading to partition, but the creditor is entitled to prove, if he can, an intention to create *correality*.³

Under these circumstances the decision is perfectly intelligible: If the intentions of parties were that M. and S. should be constituted *correal* debtors, then S. remains liable in *solidum*, though M. is eliminated; if their intentions were that M. and S. should be constituted *pro rata* debtors, the elimination of M. cannot increase S.’s *pro rata* liability.

¹ *Vide supra*, p. 208.

² *Vide supra*, p. 208, 215.

³ *Vide supra*, p. 216 f.

(2) D. (45. 2) 4. *Supra*, p. 47 ff.

The representation given in this fragment of a stipulation as consisting of a formal interrogatory and response has, of course, no practical place in the Justinianian law. If my previous conjecture that the Compilers have deleted references to the necessity of a distributive form of interrogatory in a correal stipulation, be sound, then the significance of the fragment from the Justinianian standpoint must be that, where a joint agreement is made orally, no special form of words is required to create solidarity, as opposed to partition, provided an intention in that behalf is evident.

(3) D. (45. 2) 2. *Supra*, p. 49.

Here again we note the absence of all reference to the necessity of a distributive form of interrogatory in a correal stipulation; everything depends on the intentions of parties.

(4) D. (45. 2) 3 pr. *Supra*, p. 53 f.

In this pr. the Compilers set forth the new law of correality without unity of stipulatory act, for which purpose they have, as I believe, adapted a text of Ulpian's originally dealing with the case where a sponsor or fidepromissor is taken bound ex intervallo. Justinian's constitution C. (8. 41 (42)) 8 had removed all fear that the second of the two separate but related promises would ipso iure novate the first, and hence it is said (*a*) "in duobus reis promittendi frustra timetur novatio."

Period β does not signify that T. has interrogated M. and S. correally (*i.e.*, from the Justinianian standpoint, has made a joint proposal to them that they

should undertake correal liability), and that an interval elapses between their respective answers (*i.e.*, the final agreement of each to be bound). In such a case we would have only a single stipulatory act and no question of novation could arise. What the inelegant words “*licet ante prior responderit, posterior etsi ex intervallo accipiatur*” do mean is that first of all the one debtor is taken bound singly, and then after an interval the other is taken bound singly, so that we have two separate acts, oral or written. Here “*responderit*” (without previous mention of an interrogatory) is used by the Compilers in precisely the same sense as the following “*accipiatur*” which, we believe, stood in Ulpian’s original text. The words “*pristinam obligationem durare et sequentem accedere*” are obviously modelled on the “*antiora stare et posteriora incrementum illis accedere*” clause of C. (8. 41 (42)) 8; cp. *Inst.* III. 29. 3a: “*manere et pristinam obligationem et secundam ei accedere.*”

Period γ is a very clumsy adaptation of Ulpian’s original text, but its import is perfectly clear: Provided the intentions of parties are that M. and S. shall be constituted correal debtors, it is immaterial whether they (M. and S.) are taken bound together or separately; for novation cannot operate without an express agreement to that effect.

(5) D. (46. 1) 43. *Supra*, p. 54 ff.

Here the second principal stipulation is not declared to be made *novandi animo*; hence novation does not operate, as it must have done under the classical law. The actual decision as to the two fideiussors not being co-fideiussors for the purposes of *beneficium divisionis*, does not concern us in this work.

- (6) D. (46. 2) 8. 5. *Supra*, p. 57 ff.; *infra*, p. 233.
D. eod. 31. 1. *Supra*, p. 129 ff.

Periods δ and ϵ of the first of these paragraphs and period δ of the second show us the new law of novation.

- (7) D. (45. 2) 6. *Supra*, p. 99 ff.

We have now to consider § 3 (periods $\eta - \kappa$) only of this fragment.

Period η , as it stands, apparently means that in constituting two parties correal debtors, there may be fixed a time within which the answers of both (*i.e.*, the final agreement of each to be bound) shall (may) be given. From this remark it is to be inferred that if both answers are given within the time fixed, a correal obligation is validly constituted, even though there is a break in the continuity between these answers. Here the infelicity of the statement "*ita constitui . . . habeatur*" (lit. "may be so constituted that also a period of time is fixed") renders it plain that the Compilers have attempted to adapt certain words of Julian's to new surroundings. We also note the mention of a response (*respondeat*) without a previous mention of an interrogatory. I have already suggested that Julian wrote "*interrogari*" in the place now occupied by "*constitui*," and then gave the outline of a stipulatory formula. Naturally the Compilers deleted the formula, and, in conformity with this deletion, they made, as I conjecture, the harsh substitution of "*constitui*" for "*interrogari*"; the fixing of the period of time in question was no longer achieved by manipulating the terms of a formal interrogatory, but merely by an informal agreement to this effect.

The significance of periods η and θ , taken together, seems to be as follows: Though a definite

time may be fixed within which both answers shall (may) be given (in which case if both answers are given within the time fixed, a correal obligation is validly constituted even though there be a break between them), yet, even where no such time is fixed, the elapse, between the giving of the two answers, of a "moderate interval," or the fact of any one of the parties meanwhile performing a "moderate act not contrary to the obligation," will not prevent the constitution of a correal relation.¹

With regard to these provisions, we note in the first place that the same have no application where the stipulation is concluded by means of written acts, but only where it is concluded orally. In the second place we note that during the "moderate interval" the parties may separate, as appears from the interpolations in D. (45. 1) 1. 1,² and this possibility, though not here mentioned, is the really vital point. The mature classical jurisprudence, we believe, did not exclude the possibility of an interval of time elapsing between different stages of a stipulatory act, but insisted on the parties remaining continuously present throughout the interval; the Compilers abated this rule of continuous presence by allowing the parties to separate for a "moderate" period. In the third place we note that, as already remarked,³ the ideas of "modicum intervallum" and "modicus actus non contrarius obligationi" are too indefinite for practical use, so that they can only represent a piece of doctrinaire attenuation of the classical law by the Compilers.

Period *ι* admits the possibility of a fideiussor being

¹ Note *quominus + indic. (sunt)*, which, if it cannot be pronounced absolutely impossible in classical law Latin, is at any rate in the highest degree suspicious.

² *Supra*, p. 104.

³ *Supra*, p. 211.

taken bound between the principal debtors. From the standpoint of the Justinianian law this is altogether trivial,¹ and we are therefore safe in conjecturing that we have here simply an adaptation of Julian's text, which point will be discussed in our treatise on Accessoriality. In the inelegant period κ the same ideas of "modicum intervallum" ("nec longum spatium") and "actus non contrarius obligationi" (not even qualified as "modicus") reappear.

(8) Venuleius D. (45. 2) 12 pr. *Supra*, p. 103 ff.

As regards period α of this pr. we are bound to assume, even from the Justinianian standpoint, that the co-debtors, M. and S., have been interrogated jointly, that is to say, have been jointly invited, however informally, to undertake liability. If there were two separate stipulations, that is to say, if M. promises x to-day and S. promises to-morrow "eadem decem quae M. promisit," the statement that S. is not bound would be obviously false. The question then arises whether it is likely that the Compilers deliberately substituted "promissuri" for an "interrogati" written by Venuleius. If they did so, their intention must have been to eliminate any suggestion of a formal interrogatory; but certainly such a substitution was somewhat unnecessary, for "interrogati" might quite well be understood in the informal sense of the Justinianian law. Under these circumstances colour is lent to the alternative suggestion that the whole phrase "ex duobus qui promissuri sint" is due to the Compilers, being introduced in order to supply the missing context; in introducing these words afresh it was quite indifferent whether they wrote "inter-

¹ Note also the non-committal mode of expression: "may possibly be deemed not to prevent."

rogati" or "promissuri." The point is, however, of little importance, and we may content ourselves with the restoration "interrogati."

Approaching now the pr. from the Justinianian standpoint, and assuming the existence of a joint informal interrogatory, we see the purport of period α to be that both answers must be given on the same day as the interrogatory is put, and that any answer given thereafter is invalid. Clearly this represents an application of the Compilers' "idem dies" rule¹ to the case of the correal stipulation.

Period β as it stands seems intended to serve as a justification of this "idem dies" rule: "(for a promise is invalid) when (after the question has been put) the stipulator or the promisor goes away to other business, though, this business being concluded, he (the promisor) gives an answer." That is to say, where the interval between question and answer is extended overnight, the parties on separating must be presumed to turn to other business which breaks the continuity of act. The absolute formulation of the principle in this period² is, however, false from the Justinianian standpoint, for, as D. (45. 2) 6. 3 expressly tells us, the continuity of act was not broken by the intervention of a "(modicus) actus non contrarius obligationi." No attempt need be made to clear up the antinomy; the Compilers' manipulations of the classical requisite of *continuus actus* are too devoid of all reality to deserve serious attention.

(9) Papinian. D. (45. 2) 9. 2. *Infra*, pp. 266, 282 ff.

It is certain that the passage "cum duos reos . . . habebitur" (period ι) was not written by Papinian.

¹ *Vide supra*, p. 211.

² Cp. also D. (45. 1) 137 pr. (itpd.) *supra*, p. 103.

The expression “*duos reos promittendi facere ex diversis locis*” seems to contemplate the case where the creditor gets two parties to send him correally related promises from different places; such an idea is absurd from the classical standpoint, but, as already shown,¹ perfectly intelligible under the Justinianian law. This being so, we see that the verb “*stipulari*” does not here connote an oral interrogatory, but has the same untechnical meaning as our “stipulate” = “to provide for in the contract.”

§ 30. The Abolition of Extensive Process-Consumption.

The institute of process-consumption is only intelligible under what we may call an “organic action system,” that is to say, a system in which an action is regarded as a “processual individuum”² having a nature and life of its own, passing through different stages of existence and capable of exercising an influence both on other actions and on substantive rights. This idea of the organic action was perfectly realised in the processes of the *legis actio* and formulary systems.³ The opposite is the conception of an action as a mere lifeless framework or mechanism for submitting substantive claims to adjudication; such were the processes of the extraordinary cognition system.⁴ Hence, when the *ordo iudiciorum privatorum* was abolished towards the end of the third century,⁵ the whole doctrine of process-consumption ought to have been abolished likewise. No such abolition, however, took place, and so the doctrine in question, as indeed was only natural, continued to survive by force of inertia, as

¹ *Supra*, p. 215 f.

² Levy, *Konk.*, p. 162.

³ Also in the forms of action of the English common law.

⁴ And of modern systems generally. ⁵ Girard, *Man.*, p. 1091.

part of the Roman legal tradition. But as there was now no longer any such thing as joinder of issue in the classical sense, the attribution of consuming efficacy to a certain stage in the proceedings, deemed to correspond to the old *litiscontestatio*, was a purely arbitrary device.

Under these circumstances the doctrine of process-consumption, resting as it now did on a foundation of sand, could not fail to undergo a severe attenuation in the post-classical period. Not only was there introduced a regular system of "after-actions," granted in despite of process-consumption¹—under the classical law the grant of such an action depended entirely on equity—but, as Justinian expressly informs us in C. (8. 40 (41)) 28, extensive process-consumption could be, and in practice was, almost as a matter of common form, excluded by simple agreement between the parties. That extensive process-consumption could be so excluded in classical times, I believe to be quite impossible; for the same was a civil law consequence which, if the necessary conditions were fulfilled, must take place whatever the parties intended. The faculty of excluding extensive process-consumption by pact must therefore be attributed to the post-classical law.

Justinian by C. (8. 40 (41)) 28 of the year 531 abolished extensive process-consumption in the case both of accessorality and of correality. Paragraph 2 of this constitution relates particularly to the latter:

Idemque in duobus reis promittendi constituimus,
ex unius rei electione praeiudicium creditori
adversus alium fieri non concedentes, sed
remanere et ipsi creditori actiones integras et

¹ See references in Levy, *Konk.*, index s.v. *Nachforderungsklage*.

personales et hypothecarias, donec per omnia ei satisfiat.

It seems highly probable, however, that this abolition of extensive process-consumption as between correal debtors was originally accomplished by means of a separate constitution which the Revisers of the Code in 534, for the sake of brevity, combined with the similar constitution relating to fideiussors.

The words "ex unius rei electione" in the above quoted § 2 and the similar words in § 1 are worthy of attention. The pr. of this constitution, indeed, shows plainly enough that process-consumption is referred to, and, as already remarked,¹ the classical jurists themselves sometimes employed "electio" in the sense of "election perfected by litiscontestation." Yet, from Justinian's use of the material terms "eligere" and "electio" here and elsewhere,² as well as from our general knowledge of the principles of the Justinianian system, we may justly infer that extensive process-consumption had now come to assume in large measure a substantive complexion. In other words, to the mind of a Byzantine lawyer litiscontestation (prior to 531) had extensive consuming effect, not merely as a processual fact, but because it was deemed to indicate a material intention on the part of the creditor to exact the amount due from one correal debtor, and to let the others go scot-free. Here, plainly we have a complete degeneration of the original theory of extensive process-consumption, a degeneration, moreover, which absolutely destroyed any grounds whereon the retention of extensive process-consumption in the

¹ *Supra*, p. 122.

² See e.g. C. (8. 40 (41)) 23 (*infra*, p. 328); D. (16. 3) 1. 43 (a), (*infra*, p. 260); C. (6. 2) 22, 1 d, 1 e, 4 c; *Inst.* IV. 1. 16 (18).

legal system might still be supported. Actually a creditor, by joining issue with one correal debtor, had no wish to let the others go scot-free if he failed to extract the full amount of the debt from the one sued; furthermore, it was now held that the extensive consuming operation of *litiscontestatio* could be prevented by a previous agreement to this effect. In point of fact, from the first moment when extensive process-consumption could be excluded by pact, its final doom was sealed, and the only criticism we can make on Justinian's reform is that it was long belated.

C. (8. 40 (41)) 28. 2 only applied in terms to passive solidary relations, and here it had the important effect of destroying the foundation of the classical distinction between correalty and simple solidarity; in fact as regards consumption the Justinianian correalty corresponds to the classical simple solidarity. This innovation obviously necessitated a change in those classical texts which denied the existence of a correal relation on the ground of material "inequality" or "non-identification," while admitting the existence of a simple solidary relation. The Compilers were bound, if they discharged their duty efficiently, to give the phrase "*duo rei (promittendi)*" an enlarged significance covering every passive joint solidary relation, whether correal or simple according to the classical distinction, and hence to affirm that co-debtors were *duo rei* in certain cases where the classical texts denied this. As was only to be expected, however, the Compilers failed to carry out the work of interpolation in a proper manner.

When it became possible to exclude extensive process-consumption by pact we may conjecture that the practice grew up of excluding extensive

responsibility by pact likewise. Extensive responsibility, as we have seen,¹ was in a sense the counterpart of extensive process-consumption. Accordingly, when Justinian excluded the latter by force of law, it is a reasonable deduction that the former was implicitly excluded by force of law likewise. Thus, we may take it as a general principle that each Justinianian correal debtor was liable in respect of his own "culpa" and mora only.²

The question has been much canvassed whether Justinian's abolition of extensive process-consumption in the passive case should be applied by analogy to the active case also.³ The majority of writers are against such an application, and in fact it is perfectly clear that *litiscontestatio* still had an "occupatory" force under the Justinian law. For example in D. (45. 2) 2⁴ we read "*ideoque petitione . . . unius tota solvitur obligatio*," which words can only apply to the active relation, though the Compilers by their preceding interpolations have carelessly made them seem to cover the passive case also. Likewise, in D. (46. 2) 31. 1,⁵ we read "*fere autem convenit . . . unum iudicio petentem totam rem in litem deducere*." Again, in D. (46. 1) 5 i. f.,⁶ we read "*plane si ex altera earum (sc. specierum obligationis) egerit, utramque consumet, videlicet quia natura obligationum duarum quas haberet ea esset ut, cum altera earum in iudicium deduceretur, altera consumeretur*."⁷

The question, however, arises whether this possibility of one correal creditor occupying by

¹ *Vide supra*, p. 82 f.

³ See Binder, p. 423 ff.

⁶ *Vide supra*, p. 132.

² See passages quoted *supra*, p. 84 f.

⁴ *Vide supra*, p. 49.

⁵ *Vide supra*, p. 129.

⁷ Cp. also D. (13. 6) 6, *infra*, pp. 290, 295.

litiscontestatio can be regarded as connoting process-consumption in the classical sense. In my opinion it is more likely that the Justinianian lawyers here treated occupation as a material, rather than a processual, result. The creditor who first joins issue excludes the other, not so much on the ground that the right of the other is thereby extinguished, as because he himself thereby acquires a prior claim to the prestation. If it were shown that issue had been joined with no serious intention of exacting the prestation, I venture to doubt whether the Justinianian lawyers would have refused the other creditor an action. Again, in certain passages, where process-consumption operated extensively under the classical law, the Compilers have interpolated the text so as to attribute extensive consuming effect to solutio alone. Such passages¹ are D. (39. 3) 11. 1:

si unus egerit [*et restitutio operis litisque aestimatio facta sit*] ceterorum actionem evanescere,

and D. (47. 12) 6:

quo cessante si alius egerit, quamvis rei publicae causa afuerit dominus, non debet ex integro [*adversus eum qui litis aestimationem sustulerit*] dari.

If the view here suggested be sound, we have, in the case of Justinianian active correality, a concurrence of material rights rather than of actions, and this result seems in complete harmony with the spirit of the Justinianian law. Hence from the standpoint of the Compilers, such passages as D. (45. 2) 16 must have had a somewhat different

¹ See as to these passages Levy, *Konk.*, pp. 379 n. 1, 387 f., 398 f.

significance than that which they bore under the classical system.¹

The question of concurrence of material rights *v.* concurrence of actions becomes of practical importance in the case where the classical law, while excluding active correalty on the ground of "inequality" or "non-identification," admitted a relation of active simple solidarity. If, as we think, the occupatory force of *litiscontestatio* under the Justinianian law depends, not on process-consumption, but rather on a material preference accorded to the first creditor who institutes proceedings, this preference should be accorded in the case of any active solidary relation, whether correal or simple according to the classical distinction. But here again we find a failure on the Compilers' part to carry out the work of interpolation consistently; indeed, in D. (45. 2) 15 i. f., they have ignored the question of occupation altogether.²

We thus reach the result that, though C. (8. 40 (41)) 28. 2 only applied to passive solidary relations, extensive process-consumption in the classical sense probably had, under the Justinianian system, no real place in active, any more than it had in passive, solidarity. *Solutio*, or a fact which the law regarded as equivalent thereto, was the sole consuming agent in both cases, though in the active case the law still attributed a material occupatory force to *litiscontestatio*.

¹ That is to say, in the passage cited (*vide supra*, p. 128) the obligatory right of the creditor who has not sued is, under the classical law, extinguished absolutely by process-consumption (cp. *supra*, p. 123, i. f.), while, under the Justinianian law, it is merely deferred to the preferential claim acquired by the other party through *litiscontestatio*, and remains in existence until extinguished by *solutio-consumption*.

² *Vide infra*, p. 234.

But what as to the effect of an absolatory judgment pronounced in favour of one of two solidary debtors against the common creditor or against one of two solidary creditors in favour of the common debtor? Can such absolution ever be pleaded as *res iudicata* for or against the other co-debtor or co-creditor? This raises a very nice point of Justinianian law which has been the subject of much controversy.¹

The better opinion seems to be that the absolatory judgment could never be pleaded as *res iudicata* under the circumstances figured.

In the passive case this view receives support from D. (46. 1) 52. 3.² The result, then, is that where the creditor sues one of two solidary debtors and the judge dismisses the action, in such case, even where the judgment proceeds on grounds which are not merely personal to the particular defendant but strike at the roots of the solidary relation as a whole, the creditor is perfectly entitled to commence a fresh action against the other debtor; possibly he may succeed in finding another judge who will uphold the contract against the new defendant. In other words, an absolatory judgment can only enure to the benefit of the particular debtor in whose favour it is pronounced.

In the active case, if one of two solidary creditors sues and is defeated, the result seems to be that the preferential claim which that creditor acquired by first joining issue is nullified, so that the other creditor can now institute fresh proceedings.

¹ See Binder, p. 251 ff. Under the post-classical law prior to 531 the same question would arise where extensive process-consumption had been excluded by pact. It might also arise, even under the classical law, in the case of simple solidarity.

² *Vide infra*, p. 332 ff.

§ 31. Authorities (§ 30).

(1) D. (46. 2) 8. 5. *Supra*, pp. 57 ff., 221.

Period ϵ of this paragraph, besides showing the new law of novation, also shows solutio-consumption as the basis of the solidary relation established where a novatory intention is not present.

(2) D. (45. 2) 3. 1. *Supra*, p. 126 ff.

Period ζ affords an example of solutio-consumption introduced by the Compilers in both the active and the passive cases, where Ulpian, I believe, dealt only with the passive case and mentioned process-consumption.

(3) D. (46. 1) 5. *Supra*, p. 132 ff.

The Compilers' action in transferring, as we suppose, the motive "quia natura . . . consumeretur" from the passive case (period β) to the active case (period ϵ) is specially instructive.

(4) D. (45. 2) 15. *Supra*, p. 161 ff.

According to my previous conjecture, Gaius, after having, in β , quoted Julian to the effect that T. and S. were not correal debtors, proceeded in γ to explain what their actual relation was, namely, simple solidarity quoad the prestation of x. The Compilers' mode of dealing with the fragment is interesting and instructive as affording an insight into their methods in general. They left period β intact; but in the first part of γ they changed the denial of process-consumption to a denial of solutio-consumption. Thus we get in γ the extraordinary dictum: Solutio of x to either T. or S. (or solutio of Stichus to S.) leaves the debtor still bound to the

other, but solutio of x to either frees him from the other! The glaring contradiction of these statements the Compilers have sought, in an altogether futile manner, to tone down by the insertion of "dicendum est ut." The question as to whether or not litis-contestation by one of the co-creditors has occupatary effect, they do not mention.

Let us now endeavour to find the correct decision in the case before us from the Justinianian standpoint. Solutio of x to either T. or S. frees the debtor from the other; so much is clear. But assuming that the debtor succeeds in obtaining from T. a transfer of the property in Stichus, and makes the same over to S., is he thereby freed from T.? The answer depends on how far the Justinianian law has got towards realising the pure idea of "subjective alternativity," independent of "substantial equality of prestation."¹ Is it willing to recognise the possibility of two obligations *Titio decem dari* and *Seio Stichum dari* standing in such a relation that fulfilment of the one ipso iure extinguishes the other, or does it still cling to the idea that such a relation can only exist where the two prestations are substantially equal? I see no good reason why the Justinianian law should not have admitted pure subjective alternativity here.

Again, litiscontestatio should, we think, have been accorded an occupatary force.² If T. joins issue in respect of *decem* or S. in respect of *decem aut Stichus*, the right of the other ought meanwhile to be suspended, though it will not finally expire unless and until the creditor first suing actually receives satisfaction.³ If,

¹ *Vide supra*, pp. 11 ff., 151 f.

² Even under the classical law the praetor might quite well attribute occupatary force to litiscontestatio in this case; *vide infra*, p. 164, n. 1.

³ If the creditor who first sues is defeated, the other can then, it is thought, institute a fresh action; *vide supra*, p. 232 i. f.

however, the action is not duly prosecuted, the right of the other creditor may be held to revive.

The net result is that T. and S., in spite of the inequality of prestation, are Justinianian correal creditors, and the Compilers should therefore have recast periods β and γ entirely, changing the denial of correality (*non videri eos duos reos stipulandi*) to an affirmation thereof.

Again, as regards period α , there does not seem any good reason why a Justinianian correal relation should not be admitted in the cases figured (*usufruct, dos*), if the parties really intended this result.

(5) Julian. D. (45. 2) 5. *Supra*, p. 169 ff.

If our previous conjectures regarding this fragment be sound, Julian, in the case where two smiths correally promise certain *operae*, on the one hand denied the possibility of a correal relation being established, because *operae* are individualised by the person of him who renders them, but on the other hand he allowed such a promise to produce a relation of simple solidarity.

This being so, if the Compilers' interpolations could be attributed to a desire of substituting Justinianian correality for the classical simple solidarity, they would merit our entire approval. But, as we have seen, there are cogent reasons for thinking that the Compilers were here actuated mainly by an intention of obliterating the rule that services are essentially individualised by the person of him who renders them. The presence of the words "*eiusdem peritiae*," which as they stand subject the establishment of correality to a quite impracticable condition, is in favour of the latter view; by requiring the smiths to be of the same skill, the Compilers sought

to tone down their elimination of the individualisation rule.

- (6) Papinian. D. (45. 2) 9. 1. *Infra*, pp. 265 f., 271 ff., 281.

As will be shown in the next chapter, there is every reason to believe that Papinian, while denying in period γ that co-depositaries “a quibus inpar suscepta est obligatio” were correal debtors, held their relation to be one of simple solidarity. The Compilers should therefore have altered the text so as to affirm the existence of Justinianian correality, and the fact of their having failed to do so bears eloquent testimony to the defectiveness of their methods. If the co-depositaries in the case mentioned are not duo rei in the Justinianian sense, we immediately ask, What then is their relation? and to this question no answer is forthcoming.

§ 32. Novel 99.

Justinian's famous Novel 99 of the year 529, entitled *περὶ ἀλληλεγγύων*, enacts as follows:—

(i) If two or more parties are taken bound as *ἀλληλεγγύως ὑπεύθυνοι*, but without any express provision that any one of them is liable for the whole prestation (*εἰς ὁλόκληρον*), in such case the liability shall be borne by all in equal shares;

(ii) If it is expressly provided that any one of them is liable for the whole prestation, a *beneficium divisionis* shall be granted;

(iii) If any proceedings are taken on the contract, the judge shall summon before him all the parties who are resident in the same locality, and dispose of the case against all at the same time.

The first question we naturally ask is regarding

the significance of the terms ἀλλήλων ἑγγυοι, ἀλληλέγγυοι, ἀλληλεγγύως ὑπέθυνοι. This point is much disputed, but the view which most commends itself to me is as follows: The Greeks in the period of their "naïve legal-consciousness"¹ reached the conception of contractual solidarity through that of mutual suretyship, the same process being traceable in Germanic law where solidary debtors bound themselves "one for all and all for one."² Ἀλληλεγγύη is therefore simply Greek solidarity.³ The oldest Greek documents which we possess generally contain indeed both an obligation of the debtors as ἀλλήλων ἑγγυοι (εἰς ἕκτισιν),⁴ and also a clause expressly conferring on the creditor a right of exacting the full debt "from one and each and from whichever he may elect": ἡ δὲ πρᾶξις ἔστω καὶ ἐξ ἑνὸς καὶ ἐκάστου (οἷον ὁποτέρου) καὶ ἐξ οὗ ἐὰν αἰρῇται. These latter words, however, gradually become rarer, and by the Byzantine age they had disappeared altogether.⁵

The second question we ask is, In what relation do the Greek ἀλλήλων ἑγγυοι stand to the Roman duo rei promittendi? My answer is as follows: Beyond the fact that both were solidary debtors, there was originally no relation between them whatever. Roman correality was evolved from, and always had its chief seat in, the oral correal stipulation; Greek ἀλληλεγγύη was created by a written act. The whole process of reaching solidarity through mutual suretyship implies a certain indefiniteness and fluidity of legal forms and ideas, and must be pronounced impossible under a rigid formalistic system like the

¹ Binder, p. 306.

² Binder, l.c.

³ Collinet, *Études Historiques sur le Droit de Justinien*, I., p. 139.

⁴ As to the expression εἰς ἕκτισιν, see Partsch, *Griechisches Bürgerrechtsrecht*, p. 209 ff.

⁵ Mitteis (with Wilcken), *Grundzüge u. Chrestomathie d. Papyruskunde*, vol. II., part I. (*Grundzüge*), p. 113 f.

Roman *ius civile*. Any suggestion that in Roman law two reciprocal fideiussory stipulations could per se produce solidarity must, I believe, be excluded absolutely. If M. and S. were to attempt to bind themselves as *mutui fideiussores* without also binding themselves as principal debtors, such a proceeding would be altogether futile. If they were to bind themselves as *pro rata* principal debtors and then each were to bind himself as fideiussor for the other, the result would not be solidarity at all, but two cumulative principal *pro rata* obligations each with an accessory obligation of its own. Under these circumstances I must entirely reject Collinet's view¹ that Papinian in D. (45. 2) 11 pr. admitted the validity of a process of *mutua fideiussio* modelled after the Greek ἀλληλεγγύη; my own suggestions as to this pr. have already been given.²

On the other hand, however, it was inevitable that correality and ἀλληλεγγύη should be brought into relation with one another after the *constitutio Antonina* of the year 212 had extended Roman citizenship and with it Roman law to the whole Empire. After that event the legal position of the ἀλλήλων ἑγγυοὶ as solidary debtors depended on their assimilation to the *duo rei promittendi* and their compliance with the rules governing the latter. In the Eastern provinces the mere execution of a document in which two parties made a joint promise as ἀλλήλων ἑγγυοὶ, no longer sufficed to create a legal correal obligation or any legal obligation at all. On the contrary a correal stipulation was now required for this purpose, though in practice, no doubt, the performance of the legally indispensable oral act was largely fictitious.

¹ *Op. cit.*, p. 131 ff.

² *Supra*, p. 135 ff.

The Greek ἀλληλεγγύη was received into the Justinianian law, and as no oral stipulation was now required, the mere execution of a document containing a joint promise by two parties as ἀλλήλων ἑγγυοὶ sufficed in itself to create a Justinianian correal obligation.¹ Hence ἀλλήλων ἑγγυοὶ must now be regarded simply as the Greek equivalent of *duo rei promittendi*. The rubric of Novel 99 περὶ ἀλληλεγγύων is translated in the *Authenticum* "de reis promittendi" ("rei promittendi" obviously meaning correal debtors), and this translation is literally correct. It would appear, however, that the idea of ἀλληλεγγύη covers Justinianian joint solidarity or correality alone, and does not extend to Justinianian several solidarity.²

The third question which we ask is, What can have induced Justinian to make ἀλλήλων ἑγγυοὶ liable only pro rata, unless they were expressly declared to be liable singuli in solidum? This is a perplexing point, but the following solution may be suggested: According to the interpolated texts of the *Digest*, the question whether two or more parties were liable singuli in solidum or pro rata depended essentially on the intentions of parties.³ This state of the law may well have given rise to disputes as to what the intentions of parties really were in particular cases, and Justinian therefore deemed it advisable to lay down an objective rule. In deciding that the words ἀλλήλων ἑγγυοὶ or the like should henceforward produce merely pro rata liability unless solidarity were provided for in express terms, the Emperor may have thought

¹ Such a contract, if purporting to be made with the creditor personally and not with a slave of his, would be subject to the provisions of C. (8. 37 (38)) 14 as regards presence in the same town, unless it could receive effect as a proper litterarum obligatio; *vide supra*, p. 208 f.

² *Vide supra*, p. 214.

³ *Vide supra*, p. 216 ff.

he was carrying out the opinion of Papinian in D. (45. 2) 11. 2: "partes viriles deberi, quia non fuerat adiectum singulos in solidum spopondisse ita ut duo rei promittendi fierent."¹

The fourth question we ask is, What induced Justinian to confer a *beneficium divisionis* on co-debtors expressly taken bound *singuli in solidum*? This question need not cause any difficulty. The classical law strictly confined this benefit to parties who were bound in an accessory capacity,² but in Justinian's time there was a decided movement, which can be seen in interpolated passages of the *Digest*,³ to extend the same benefit to co-principal debtors likewise. In Novel 99 Justinian carried out this movement to its logical result.⁴

¹ *Vide supra*, p. 37 ff.

² *Vide supra*, p. 34 f.

³ *E.g.*, D. (26. 7) 38, see Levy, ZSS. 37, p. 69 ff.; D. (19. 2) 47, *infra*, p. 304 ff.

⁴ The idea of the legislator appears in the words: καὶ μὴ τὸ κοινὸν χρέος ἰδιὸν τινος γινέσθω βάρος.

CHAPTER V.

SOLIDARITY FROM REAL AND CONSENSUAL CONTRACTS.

§ 33. The Application of Solidarity to Formless Negotia.

THE extension of the institute of solidarity from the domain of obligations *verbis* to that of obligations *re* and *consensu*, we may assume to have taken place fairly early in the middle classical period, that is roughly the period from Labeo to Julian.¹ Prior to this extension a real or consensual obligation would, for purposes of "correalisation," have to be transformed into a verbal obligation.

The mode in which this extension was achieved is easy to understand. There was now admitted the possibility of a formless negotium having two or more parties on the one side or the other, and endowed with a joint nature by the fact that all these parties had acted *communi consensu*. The material community of intention is here allowed to take the place of the formal unity of verbal contract. Accordingly, where such community is present, we have unity of originating cause, just as if the different obligations had arisen from one and the same joint stipulation.

The first question that arises is concerning the antithesis solidarity *v.* partition. Here, if we leave

¹ *Vide supra*, p. 22, n. 2.

aside *mutuum* which was governed by rules of its own,¹ we must, I believe, apply the principle that an active joint contract leads naturally to partition, a passive joint contract to solidarity.² The natural tendency of a passive joint contract to produce solidarity appears from the phrase "*utriusque fidem in solidum secutus*" or the like, as applied to the creditor in a passive correal obligation from real or consensual contract. This phrase connotes, *inter alia*, an intention to exclude partition—to look to any one of the debtors for the rendering of the entire prestation—and its special significance here is that, unless the terms of the contract otherwise provide, the creditor is entitled to make such an intention effective. All this amounts to saying that solidarity pertains to the *naturalia* of a passive joint contract, for obviously a creditor will always assert an intention in favour of solidarity, rather than partition, if he can.³

A passive joint contract might, however, be so framed as to produce partition, though we can hardly regard this case as of very frequent occurrence; if partition be intended, the more natural course generally is to conclude separate contracts. Likewise there is nothing to prevent an active joint contract, which naturally produces partition, being so framed as to produce solidarity, but it seems more likely that a correal stipulation would here be employed in practice.

All real and consensual contracts, with the exception of *mutuum*, are synallagmatic (bilateral). This is most distinctly seen in the case of *venditio*—

¹ *Vide infra*, p. 254 ff.

² *Vide supra*, p. 31 ff.

³ See further *infra*, p. 268 f.

emptio and locatio-conductio, where each of the two reciprocal obligations is sanctioned by an action bearing a name peculiar to itself (iudicium venditi, empti, etc.); these obligations are interdependent in the sense that fulfilment of the one cannot be exacted unless the party entitled has already discharged, or offers to discharge, his own accrued liability under the other. Again the contract of mandate produces two reciprocal obligations which under the classical law are both sanctioned by the same iudicium mandati. According to the most probable view,¹ the formula (in ius concepta) of the latter action instructed the iudex to condemn either party to the other (alterum alteri), as the circumstances of the case might require; the distinction between obligatio (actio) mandati directa and obligatio (actio) mandati contraria seems to be entirely Justinianian, and it is merely for sake of convenience that we continue to employ the same. Again, the contracts of deposit and commodate, according to the most probable view,² only gave rise to a single iudicium in ius, which sanctioned the "direct" obligation between the depositor (commodator) as creditor and the depositary (commodatary) as debtor, and this obligation alone; the alternative iudicium in factum sanctioning the same obligation³ we may here ignore. The "contrary" obligation between the depositary (commodatary) as creditor, and the depositor (commodator) as debtor was for the most part merely "natural," that is to say, it could be pleaded in defence to an action at the depositor's (commodator's) instance, but did not give rise to an

¹ See Biondo Biondi, *Iudicia Bonae Fidei* in *Annali del Sem. giurid. della R. Univ. di Palermo*, VII., p. 62 ff.

² See Biondo Biondi, *op. cit.*, p. 90 ff.

³ See *Gai.* IV. 47.

action of its own; in special cases, however, the praetor seems to have granted a *iudicium depositi* (*commodati*) *contrarium in factum*.¹

The bilateral quality of the foregoing contracts has this result, namely, that where there are two or more parties on the one side, the contract is both actively and passively joint at the same time; as the originating cause of obligations between two or more creditors and a single debtor it is active, as the originating cause of obligations between a single creditor and two or more debtors it is passive. Now the point we have specially to emphasise is that a joint real or consensual contract may at the same time produce partition on the active side and solidarity on the passive side. As we know, an active joint contract leads naturally to partition, whereas a passive joint contract leads naturally to solidarity, and these two results are here combined.² Suppose, for example, T. sells an article to M. and S. jointly, no express provision being made as regards solidarity or partition; here M. and S. were, I believe, under the classical law bound *singuli in solidum* to pay the price (*obligatio venditi*), but neither was entitled alone to claim more than a *pro rata* share of the article (*obligatio empti*). As we shall see later,³ the Compilers obliterated this unsymmetrical case of active partition concurring with passive solidarity, and sought to reduce the various situations which might arise to a scheme in which partition on the one side always concurred with partition on the other, and likewise as regards solidarity.

¹ See further *infra*, p. 279, n. 1.

² A similar combination would be found if a joint contract were artificially rendered solidary on the active side and *pro rata* on the passive side.

³ *Vide infra*, p. 314 f.

The antithesis solidarity *v.* novation does not here present itself, because novation could, under the classical law, be effected by a formal negotium alone.

As regards the antithesis solidarity *v.* cumulation, we observe that a joint real or consensual contract cannot, any more than a joint stipulation,¹ produce obligations in solidum which are cumulatively related.

The constitutive requisites of a joint real or consensual contract, over and above that of communis consensus, are simply the requisites of the particular contract under consideration adapted as necessary. In this connection, however, an important point is to be noted. If we leave out of consideration mutuum which occupied a peculiar position, we observe that all lawful pacts made at the time of the conclusion of a real or consensual contract are elements in the contract itself. This fact marks an essential contrast between the general body of formless negotia and the formal negotium of stipulation; in the case of the latter all the terms of the contract must be set forth at length, or in any event incorporated by reference,² in the interrogatory, otherwise they stand completely outside the formal act.³

If a passive joint real or consensual contract be concluded in a manner which does not introduce any "inequality" or "non-identification" between the two obligations, there can be no doubt that the result

¹ *Vide supra*, p. 60.

² Cp. Paul. D. (45. 1) 140 pr.

³ This principle was entirely obliterated under the Justinianian law, stipulation being no longer a formal act; see Riccobono, ZSS., 43, p. 344 ff.; *supra*, p. 206 f.

is a process-consumption relation,¹ *i.e.*, correality, just as if the cause of obligation had been a correal stipulation. It is here to be observed that in the case of a passive joint contract, the phrase “*utriusque fidem in solidum secutus*” or the like, apparently connotes, not merely an intention of the creditor’s to exclude partition,² but also an intention to hold each debtor responsible for the “*culpa*”³ and *mora* of the other as well as for his own. Unless this extensive responsibility is expressly excluded, it will be held to exist by virtue of an implied intention on the creditor’s part to this effect, for naturally a creditor will always assert such an intention if he can.⁴ But extensive responsibility necessarily implies constructive unity of obligation; hence we are entitled to say that, equality of prestation being assumed, this unity will *ipso iure* result unless some element exclusive of identification is expressly introduced.

The important question now arises, What will happen if, by the terms of a passive joint contract, an inequality of prestation is introduced, or, absolute equality being present, there is introduced some element exclusive of identification. We have seen⁵ that if any formal “inequality” or “non-identification” be introduced in the interrogatory of a correal stipulation, the whole act is rendered null and void. But in

¹ The rules governing process-consumption were the same here as in the case of obligations *ex stipulatu*, except that apparently an *exceptio rei iudicatae vel in iudicium deductae* was never required in a *iudicium bonae fidei*; even where the first action was a *iudicium imperio continens* or had a formula in *factum concepta*, a second action *de eadem re* could *ipso iure* be defeated by virtue of the *bonae fidei officium* of the *iudex*. Biondo Biondi (*op. cit.*, p. 38 f.) thinks that Gaius D. (50. 17) 57: “*Bona fides non patitur ut his idem exigatur*,” may have had some relation to this case.

² *Vide supra*, p. 242.

³ In the special technical sense explained *supra*, p. 80.

⁴ See further, *infra*, p. 268 f.

⁵ *Supra*, p. 93 ff.

the case of a formless negotium, there can of course be no such thing as nullity on formal grounds. What, then, is the result to be? Is the joint real or consensual contract to be pronounced ineffective on material grounds? We have ventured the conjecture¹ that under the strict civil law a correal stipulation would be rendered ineffective on the ground of a latent defect inducing material inequality of prestation, or on the ground of the prestation being materially "individualised" so that, even where the two obligations are objectively equal, their identification is excluded. But can this principle be applied in the present connection? Consider, for example, the case of a deposit made to two parties jointly. T. has deposited a certain article with M. and S. subject to the proviso that M. shall be liable for culpa in addition to his legal liability for dolus, while S. remains liable for dolus merely. Here we have an inequality of prestation which seems clearly to exclude the possibility of correality.² But can we pronounce the whole deposit "inutilis," that is to say, are we to refuse T. an actio depositi and leave him simply with a vindicatio³ or condictio for the purpose of recovering his property? Such a result would be altogether anomalous. The article has actually been handed over *depositionis causa* to both M. and S., and T. must have an actio depositi against each. But the fact of the deposit being joint excludes the idea of cumulation, and we are then faced with the urgent question, In what legal relation do M. and S. actually stand?

Here, I venture to think, we get at the origin

¹ *Supra*, p. 108.

² There may, however, have been some controversy on this point; *vide infra*, p. 277, n. 1.

³ Or actio ad exhibendum.

of the institute of simple solidarity. M. and S. are not correal debtors, and accordingly *litiscontestatio* can have no extensive consuming effect, nor, we think, do the co-debtors incur extensive responsibility; yet the law must treat their obligations as designed to fulfil one and the same juristic end, so that *solutio* by the one frees the other. As already explained,¹ I conjecture that the institute of simple solidarity, after having been developed within the sphere of real and consensual contracts, eventually gained a footing within the sphere of verbal contract; that is to say, material inequality or non-identification was no longer held to render a correal stipulation ineffective—all it now did was to render such stipulation productive of obligations standing in a simple solidary, instead of in a correal, relation.

It is convenient to consider in this place the result where a correal stipulation, perfectly capable in itself of producing a correal obligation, is concluded, but one or more pacts are added which, if they had been incorporated in the stipulatory formula, would have rendered the whole act null and void. This point is suggested in the first place by the famous fragment Paul. D. (12. 1) 40, particularly by the passage "*quia pacta in continenti facta stipulationi inesse creduntur, perinde esse ac si . . . pecuniam stipulatus . . . usuras adiecisset.*" If Paul had really written these words, we should be compelled to hold that the late classical jurisprudence had ceased to draw a rigid line between the formal act of stipulation itself and informal agreements ancillary thereto. But such a result would run counter to all our ideas on the subject and would necessitate a revision of our theory in general.

¹ *Supra*, p. 147 f.

Thanks, however, to Riccobono, who has proved the passage in question to be interpolated,¹ we are freed from all difficulty on this account.

But the matter does not end here. Under the classical law, though a pact added to a stipulation—whether in *continenti* or *ex intervallo* is immaterial—in no wise formed a part of the formal contract and hence was useless for the purposes of action, yet undoubtedly it could be pleaded in defence by means of an equitable *exceptio pacti* or *doli*. Consider then the following example :—

T. stipulates correally from M. and S. for Stichus, so that, if through their culpa the slave be not duly rendered, they are liable by force of law. But, either in *continenti* or *ex intervallo*, T. makes a pact with M. that the latter is to be liable merely for *dolus*; no such pact is, however, made with S., who remains under his ordinary legal liability for culpa.

Now, if the pact with M. had been incorporated in the stipulatory formula, the whole act would have been rendered null and void on account of the formal inequality of prestation thereby produced²; but obviously no such formal inequality is produced in our present case. It is, however, also obvious that the pact produces a substantive inequality of prestation. If T. sues M., the latter, by maintaining an *exceptio pacti* or *doli*, can achieve absolution unless T. proves actual *dolus*, whereas if T. sues S., condemnation is competent on the ground of mere culpa. What then is the consequence of this substantive inequality of prestation? Three alternatives present themselves :—

(i) The pact renders the stipulation altogether ineffective ;

¹ ZSS., 43, p. 345 ff.

² *Vide supra*, p. 94.

(ii) It reduces the correal relation which the stipulation per se establishes, to a relation of simple solidarity ;

(iii) It does not disturb the correal relation so established.

There can be no doubt that the third of these alternatives is the correct one. Under the civil law the pact is totally inept—it is only the praetor who says “*pacta conventa . . . servabo*”¹; in other words, the effect of the pact is purely equitable, not legal. Therefore the civil law relation of correality established by the stipulation continues unimpaired in spite of the pact. Certainly, by the operation of equity, an inequality of prestation is introduced, but this equitable inequality² cannot disturb the legal operation of extensive process-consumption ; moreover, within the limits allowed by the pact, the legal extensive responsibility of the co-debtors also remains undisturbed. The idea that the pact reduces the relation to one of simple solidarity is excluded just as much as the idea that it renders the stipulation altogether ineffective ; for, according to our theory, simple solidarity ex stipulatu is merely a device adopted by the mature classical jurisprudence in order to save the validity of a correal stipulation which, on a strict application of civil law principles, must be pronounced materially invalid.

If the foregoing argument be sound, we have the result that, in the case of obligations ex stipulatu, a correal relation can only be reduced to one of simple solidarity through some inequality or non-identification which is materially intrinsic in the stipulatory act, though not formally inconsistent with its joint nature. The possibility is excluded of a correal

¹ D. (2. 14) 7. 7.

² The case of equitable non-identification is similar.

relation ex stipulatu being reduced to one of simple solidarity by virtue of an extrinsic agreement between the parties which induces merely equitable inequality or non-identification; such agreement, in order to have any legal effect on the correal relation, would have to be incorporated in the interrogatory, and then it would render the stipulatory act formally null and void. Hence, if we wish to illustrate the reduction of correality to simple solidarity by virtue of a special pact inducing inequality or non-identification, we must turn to the case of formless negotia, where every agreement concluded at the time of the contract is an integral part of the contract itself. The effect of a pact concluded subsequently to the conclusion of the contract will be considered in our exegesis of D. (45. 2) 9.¹

In the case of formless negotia, then, the parties can by means of pacts induce inequality or non-identification, and so reduce the resulting relation from correality to simple solidarity. We now ask, Can they directly exclude the extensive operation of process-consumption by pact? In my opinion this question must, from the standpoint of the classical law, be answered in the negative. Process-consumption is a civil law result which cannot be excluded merely by the parties agreeing that it shall; such exclusion can only be effected indirectly through the introduction of some element which renders constructive unity of obligation impossible.

In order to produce a correal relation between two obligations re or consensu, unity of originating cause is as essential as in the case of obligations verbis; the unity of originating cause, however,

¹ *Infra*, p. 277 f.

here consists solely in the material fact of all parties acting with a common intention. On the other hand, as we have seen, a joint real or consensual contract may, under certain circumstances, produce a solidary relation which is merely simple. The question now arises, particularly in the case of mandate, whether the classical jurisprudence ever allowed a passive simple solidary relation to be produced by two or more separate real or consensual contracts, that is to say, without *communis consensus* between the different debtors.¹ In my opinion, this question must be answered in the negative. We have already seen² the reaction of the civil law against anything in the nature of solidarity without unity of originating cause, and the same principle must make its influence felt here also. Two obligations arising from different real or consensual contracts can only stand in an equitable solidary relation. Further details regarding this point may be postponed for our special discussion of the contract of mandate.³

Justinian's abolition of extensive process-consumption as between correal debtors by stipulation was naturally extended to the case of correal debtors by real and consensual contracts. This reform, just as in the case of obligations *ex stipulatu*, broke down the classical distinction between correality and simple solidarity, and placed all solidary obligations arising from a joint contract on a single basis of solutio-consumption; this new form of the institute we call, as before,⁴ "Justinianian joint solidarity" or

¹ An active solidary relation *ex contractu* without *communis consensus* between the different creditors is impossible; cp. *supra*, p. 214.

² *Supra*, p. 154 ff.

³ *Infra*, p. 317 ff.

⁴ *Vide supra*, p. 213.

“Justinianian correality.” Accordingly, just as in the case of obligations ex stipulatu,¹ the Compilers, if they carried out their work of interpolation properly, were bound to give the expression *duo rei* an extended significance so as to cover classical simple solidary, as well as correal, relations; they must, then, have affirmed that co-debtors were *duo rei* in certain cases where the classical jurists denied this. But here, also, the work of interpolation was imperfectly accomplished. Again, just as in the case of obligations ex stipulatu,² the abolition of extensive responsibility, we believe, followed that of extensive process-consumption.

Furthermore, the Compilers seem to have obliterated the classical principle, that a (passive)³ legal solidary relation could not be constituted by separate contracts, that is, without *communis consensus* between the various debtors. Apparently the Justinianian system here admitted a legal relation of “several solidarity,” as contrasted with the “joint solidarity” which resulted where unity of originating cause was present.⁴ This several solidarity had, of

¹ *Vide supra*, p. 228.

² *Vide supra*, p. 228 f.

³ *Vide supra*, p. 252, n. 1.

⁴ This innovation, if we are right in believing it to have taken place, is instructive. Under the classical law, if two obligations between T. and M. and between T. and S. respectively, originated from different causes, formal or formless, but were directed to one and the same juristic end, equity was wont to reduce the legal cumulative relation to a relation of solidarity (*vide supra*, p. 192). But one of the essential characteristics of the Justinianian system lies in the fact that it accorded a civil law status to rules and institutes which under the classical system had belonged merely to the *ius honorarium* (see Riccobono, *Dal Diritto rom. class. al Diritto mod.* in *Annali del Sem. giurid. della R. Univ. di Palermo*, III.-IV., p. 588 ff.; ZSS. 43, pp. 286, 293 ff., 342). Hence we arrive at the Justinianian legal relation of “several solidarity.” The position, it will be observed, works out precisely the same in the case of the stipulation and in that of real and consensual contracts, the reason being that stipulation is no longer a formal negotium (*vide supra*, p. 206 f.).

course, the same solutio-consumption basis as joint solidarity.

In the foregoing exposition we have omitted all reference to the contract of mutuum, and the same now requires a brief consideration. The main points to note are that this contract, though formless, was, like stipulation, essentially unilateral, and, also like stipulation, was sanctioned by a iudicium strictum. These facts, I think, render it probable that, as regards the antithesis solidarity *v.* partition, mutuum was governed by the same traditional civil law principles as stipulation;¹ that is to say, where a simple² joint loan was made to two parties, the latter were rendered liable merely pro rata, and so also, of course, in the active case. This result, indeed, is clearly implied in Diocletian. C. (4. 2) 12 :

Si in rem communem cum Ione mutuum sumpsisti pecuniam [*nec re*] nec sollemnitate verborum vos obligastis in solidum, et post integrum solvesti, de restituenda tibi parte contra Ionem experiri . . . potes.

Here, unless solidarity has been expressly created, the co-debtors are merely liable pro rata, so that if one of them pays the whole debt, he can, as a negotiorum gestor, recover proportionately from the other.

The question, however, arises whether a mere pact added to the joint contract was sufficient to render the co-debtors (co-creditors) bound (entitled) singuli in solidum. So far as the classical law is concerned, in my opinion this question must be answered in the negative; if solidarity is intended, a correal stipulation must be entered into.

¹ *Vide supra*, p. 42.

² *Vide supra*, p. 32, n. 1.

The opening words of Paul. D. (46. 1) 71 pr. : “ . . . Iulio Pollione et Iulio Rufo pecuniam mutuam accipientibus ita ut duo rei eiusdem debiti fuerint ” are quite inconclusive on this point, for a stipulation may perfectly well be implied.¹ Nor can any reliance be placed in the brief general statement in D. (12. 1) 7, attributed to Ulpian : “ omnia quae inseri stipulationibus possunt, eadem possunt etiam numerationi pecuniae . . . , ”² which statement may seem to favour an affirmative answer to our question. On the other hand, however, a very strong argument in favour of the negative is to be found in C. (4. 2) 12 (cit.). In this constitution the words “ nec re, ” which imply that a joint contract of mutuum could contain a pact rendering the co-debtors liable solidarily, are certainly interpolated ;³ if a simple pact made at the time of handing over the money had been sufficient to create solidarity, then the following reference to a verbal solemnity (stipulation) would be altogether superfluous. But, if we delete the words in question, we get the result that, if the co-debtors are to be bound singuli in solidum, a correal stipulation must be concluded. In point of fact, this is precisely the result which we should expect on principle. In mutuum the originating cause of obligation is the handing over of the money by way of loan, and, as the creditor’s action is a iudicium strictum, this cause can alone be founded on by him ; no additional agreement, even though made contemporaneously with the loan, is of any use for the

¹ Cp. Paul. D. (12. 1) 2. 5 : “ verbis quoque credimus . . . veluti stipulatione.”

² I do not believe Ulpian wrote these words in their present form, but this matter cannot be discussed here. No assistance can be derived, as regards our present question, from C. (2. 3) 10 = C. (5. 14) 1.

³ See Krüger *Cod.* (following Perozzi) and Riccobono, ZSS. 35, p. 262.

purposes of action.¹ Hence, if a joint loan, rendering the co-debtors liable merely pro rata, be made, this pro rata liability cannot be "correalised" by pact, so as to entitle the creditor to sue either debtor for the whole amount, and likewise in the active case.

On the other hand, under the Justinian law, where pacts had acquired a wide efficacy unknown under the classical system,² it was only natural that they should have such "correalising" power.

It seems undesirable to complicate our present treatise by references to fiducia and pignus, and the bearing of the institute of solidarity on these contracts is therefore reserved for future studies.

In the remainder of this chapter we shall illustrate the foregoing exposition by considering in the first place certain passages which deal with the contracts of deposit and commodate (§ 34), and the contracts of sale and hire (§ 35); the contract of mandate requires a special exposition (§ 36), which will be followed by certain illustrations (§ 37).

§ 34. Authorities (§ 33 (A). Deposit and Commodate).

(1) D. (16. 3) 1. 31. Ulpian. XXX. ad edict.

Si duorum servus sit qui deposuit, unicuique dominorum in partem competit depositi.³

From this decision the inference is justified that if the masters made a joint deposit personally, they would likewise be entitled merely pro rata, in the absence of a special agreement creating solidarity.

¹ Cp. Ulpian. D. (12. 1) 11. 1: "sed si dederō (*sc.* decem) ut undecim debeas, putat Proculus amplius quam decem condici non posse."

² See Riccobono, ZSS., 43, p. 338 ff.

³ *Sc.* actio.

(2) D. (16. 3) 17 pr. Florentin. VII. inst.

[*Licet deponere tam plures quam unus possunt, attamen*] apud sequestrem non nisi plures deponere possunt: nam tum id fit cum aliquares in controversiam deducitur. itaque hoc casu in solidum unusquisque videtur deposuisse: quod aliter est cum rem communem plures deponunt.

Leaving aside the banal introduction "*licet . . . attamen*" which is certainly due to the Compilers,¹ we see Florentine's argument to be as follows: A plurality of parties is required in order to effect a deposit with a sequester, for such deposit is only resorted to in the event of a dispute regarding a thing; from this latter fact it also follows that each one of the parties is here deemed to make the deposit "in solidum,"² which is not the case where several persons make an ordinary joint deposit of something belonging to them in common. The last clause renders it plain that if two parties are co-owners of a thing, their shares being, say, in the proportion of $\frac{3}{4}$ and $\frac{1}{4}$, and they jointly deposit the thing with a third party (not a sequester), each is deemed to make a deposit merely of his own pro rata share, and hence his right against the depositary is limited to such share—no doubt the position can be modified by special agreement but meanwhile we are considering only the normal legal result. On the other hand, if two parties are engaged in a dispute

¹ Levy, *Konk.*, p. 386; cp. Beseler, III., p. 35 ff., s.v. *attamen*.

² It is to be noted particularly that though a deposit apud sequestrem is "in solidum," yet the depositors are not "solidary" creditors; the reason (which will be explained presently in the text) is that active solidarity in the technical sense implies a power of "occupation" (*vide supra*, p. 18) which is here absent.

regarding the property in a thing, and they agree to deposit it with a sequester (otherwise expressed, to make it the subject of a sequestre) pending the settlement of such dispute, in this case each party is deemed to deposit the entire thing, and not merely a pro rata share thereof.

But what, then, is the right of each depositor against the sequester? Here we arrive at the specialty of the sequestre relation. That one of the depositors who establishes the better title to the thing, and he alone, has a right to reclaim the whole, and the other has no right at all. In other words, the sequestre produces two obligations "in solidum," but these obligations are both subject to a condition which can be fulfilled in the person of one only of the creditors, the condition, namely, that the better title to the thing shall be established. Hence one only of the obligations can reach perfection, and when it does so, the other is rendered non-existent ab initio. Compare Paul. D. (16. 3) 6 :

Proprie autem in sequestre est depositum, quod a pluribus in solidum **certa condicione** custodiendum reddendumque traditur.

In order further to elucidate the position, let us suppose that two parties, being co-owners of a thing, make an ordinary joint deposit of the same, but it is specially agreed that either may reclaim the whole. Here each of the parties may be said to make the deposit "in solidum," just as where they effect a sequestre, but there is all the difference in the world between these two cases.

In the case of an ordinary active joint deposit in solidum, the relation is one of solidarity. Either depositor has a power of "occupation"; if either

receives solutio from, or (assuming the solidarity to be correal) joins issue with, the depositary, the right of the other is extinguished. On the other hand, in the case of sequestre the relation is not one of solidarity; neither depositor has a power of "occupation"; only one of them is entitled to claim against the sequester, and the question as to which of them is so entitled must be decided objectively, that is to say, it depends on the settlement of the controversy regarding the ownership. If the unsuccessful party in this controversy receives solutio from, or joins issue with, the sequester, the right of the successful party remains entirely unaffected. In short there is, in the case of sequestre, no "concurrence"—no "race for occupation"¹—between the two depositors as such.

We can now see the fundamental necessity of distinguishing sequestre from ordinary active joint deposit. If several disputants regarding the property in a thing were to make an ordinary joint deposit thereof "in solidum" pending the settlement of the dispute, an unsuccessful party by receiving solutio from the depositary, or joining issue with him in an ordinary actio depositi, would extinguish the right of the successful party, and the whole end of the deposit would be defeated.

Accordingly, there had to be devised a special institute of active joint deposit called sequestre, sanctioned by a special formula sequestraria (actio depositi sequestraria) which contained an express reference to the condition of the deposit and which only the successful party was "legitimated" to employ.²

¹ *Vide supra*, p. 22.

² See Levy, *Konk.*, p. 386 f. Lenel, *Edict.*, p. 281 f., thinks that the formula sequestraria was conceived in-factum.

(3) D. (16. 3) 1. 43, 44. Ulpian. XXX. ad edict.

§ 43. α. Si apud duos sit deposita res, adversus unumquemque eorum agi poterit, [*nec*] $< \sim >$ ¹ liberabitur alter si cum altero agatur: [*non enim electione sed solutione liberantur*].

β. proinde si ambo dolo fecerunt et alter [*quod interest praestiterit*] $< \sim >$,² alter non convenietur, exemplo duorum tutorum:

γ. [*quod si alter vel nihil vel minus facere possit, ad alium pervenietur*].

δ. idemque et si alter $< - >$ ³ dolo non fecerit, [*et idcirco sit absolutus: nam ad alium pervenietur*] $< \sim >$.⁴

§ 44. ε. Sed si duo deposuerint et ambo agant, [*si quidem sic deposuerunt ut vel unus tollat totum, poterit in solidum agere: sin vero pro parte pro qua eorum interest, tunc dicendum est in partem condemnationem faciendam*] $< \sim >$.⁵

These paragraphs, perplexing though they be at first sight, cause comparatively little trouble nowadays, because the interpolations are generally admitted.

In period α, it is assumed that the deposit is joint—in fact it is almost inconceivable for a deposit with two parties to be made otherwise than jointly—and it is further assumed that there is no element of inequality or non-identification in the contract which would exclude correality. The first point decided is that the co-depositaries are liable singuli in solidum

¹ *sed*

² *fuert conventus*

³ *qui*

⁴ *conventus sit, alter qui dolo fecit liberabitur: sed is qui convenitur alterius nomine condemnari potest*

⁵ *alteri qui prior ad sententiam pervenerit res tradenda est, ita ut caveat reum adversus alterum defensu iri*

(adversus unumquemque eorum agi poterit), and not pro rata. The following denial of process-consumption and affirmation of solutio-consumption are certainly due to the Compilers. The "sed" proposed by Levy¹ in place of "nec," is an almost certain restoration and much preferable to the "et" proposed by Eisele.² The "non enim . . . liberantur" clause gives the Justinianian watchword "non electione sed solutione," the substantive "electio" taking the place of the processual "litiscontestatio"³; again, "liberantur" has no proper subject.

The result of α , as restored, is that joint depositaries are correal debtors in the full sense, unless of course correalty is prevented by the terms of the contract, and Ulpian now proceeds to give deductions (proinde) from their correal relation.

In period β the reference to solutio (quod interest praestiterit) has certainly been substituted by the Compilers for a reference to litiscontestatio (fuerit conventus or the like).⁴ The significance of the decision in this period is then as follows: Dolus in itself is a delict and as such it points to cumulation, not solidarity; if two persons have been guilty of a joint delict, then according to the fundamental principles of the strict civil law, which however were greatly modified in later times, each might be sued for the full penalty due, and neither litiscontestatio with, nor solutio by, the one had any effect on the liability of the other.⁵ But this rule does not apply to dolus communis regarded merely as a breach of contract or "quasi-contract." Where dolus "ex contractu

¹ *Konk.*, p. 210.

² *Archiv. f. d. Civil. Prax.*, 77, p. 449.

³ *Vide supra*, pp. 122, 227.

⁴ Levy, *Konk.*, p. 210, suggests "iudicium accepit."

⁵ See Levy, *Privatstrafe u. Schadensersatz* (passim).

reique persecutione descendit,"¹ it cannot have the effect of rendering correal debtors liable cumulatively. I do not, however, feel inclined to adopt Levy's suggestion² that Ulpian wrote "et" between "proinde" and "si" ("hence *even* if") as though periods α and β represented a sort of climax. It is to the decision originally contained (as we conjecture) in period δ , that such an "et" is really appropriate. The words "exemplo duorum tutorum" are highly significant, for they show that co-tutors jointly administering an undivided estate were correal debtors in the full sense; this point does not, however, concern us here.

That period γ is wholly due to the Compilers may be pronounced certain. The decision is diametrically opposed to the classical process-consumption rule, and assumes that solutio alone has extensive consuming effect; the phrase "ad (aliquem) perveniri," as here used,³ and the change from "alter" to "alius" (alium) are at any rate highly suspicious.

The whole period δ after "idemque" is generally attributed to the Compilers, but this view seems too radical; probably certain elements of the text are classical. The interpolation of the final words "nam ad alium pervenietur" may be regarded as certain, and our attention must be concentrated on the preceding clause "et idcirco sit absolutus." Obviously this clause proceeds on the theory that correal depositaries are liable each for his own culpa alone, and this we believe to be contrary to the classical law; hence in our opinion the clause in question must be interpolated. I must, however, add a

¹ These words are taken from Ulpian. D. (16. 3) 7. 1, and are pregnant with meaning: see Levy, *op. cit.*, p. 22; *Konk.*, p. 93 ff.

² *Konk.*, p. 210.

³ Cp. Levy, ZSS., 37, p. 58, n. 5.

warning against employing the present passage as an authority for the doctrine that the classical law upheld, while the Justinianian law rejected, the extensive responsibility of correal debtors. Such an argument involves a *petitio principii*; it is only because we have seen good cause for maintaining this doctrine on the ground of other passages and likewise on that of general principle, that we are entitled with any certainty to pronounce the present clause “*et idcirco sit absolutus*” interpolated.

As regards the restoration of period δ , I propose the following: Insert “*qui*” between “*alter*” and “*dolo*,” and after “*fecerit*” substitute “*conventus sit, alter qui dolo fecit liberabitur: sed is qui convenitur alterius nomine condemnari potest*” or the like. This restoration shows the connection between extensive process-consumption and extensive responsibility. Suppose of two correal depositaries M. and S., M. alone has been guilty of *dolus*, but the depositor sues S. According to the principle laid down in δ (as restored), M. is necessarily freed by process-consumption, but this fact involves no hardship to the depositor; for S. does not gain a right to absolution merely by establishing his own innocence—on the contrary he is liable to be condemned on the ground of M.’s *dolus* (*alterius nomine*).

We now turn to the active case mentioned in § 44 (period ϵ). It is unnecessary at this time of day to spend time arguing in favour of the interpolation of the passage “*si quidem . . . faciendam*”: its contents are utterly banal, its form in the highest degree inelegant, and it bears on its forefront every mark of Byzantine origin.¹ As to the substance of

¹ Riccobono, *Communio*, in *Essays in Legal History*, 1913 (ed. Vinogradoff), p. 107 (n. 2 (a) to p. 106). The reader should carefully

Ulpian's original argument we can make a shrewd guess. When two parties made a joint deposit without a special agreement in favour of solidarity, each was entitled *pro rata* merely, the basis of division being the ratio of the shares held by each in the article. Now almost certainly the words "ambo agant" do not mean that both co-depositors bring a single joint action, but that each sues in a separate action leading to a *pro rata* condemnation. But, as presumably the object of the deposit is a determinate species which cannot be divided physically without destroying its nature, the defendant, if he wishes to make specific restitution, cannot do otherwise than deliver the whole to one of the separate plaintiffs. Which of the latter is entitled to such delivery, and on what terms? Founding on Ulpian.-Julian. D. (16. 3) 1. 37,¹ Ulpian. D. (32) 11. 21 and Ulpian. D. (9. 4) 14 pr., I have ventured a restoration which answers this question.

The interpolation in § 44 is instructive inasmuch as it enables us to see that the Compilers, following perhaps in the footsteps of previous commentators, sought to schematise the various possible situations. Quite likely Ulpian, in the sequel to this paragraph, pointed out that a special agreement entitling each of the co-depositors in *solidum* was perfectly competent, and hence the scheme was suggested: active joint deposit in *solidum* (*si quidem sic deposuerunt ut vel unus tollat totum*)—active joint deposit *pro rata* (*sin vero pro parte pro qua eorum interest*). We shall see a more pronounced example of such schematisation on the Compilers' part when

note the other interpolated passages bearing on deposit cited in this essay, p. 103 ff.

¹ Cp. Riccobono, *op. cit.*, p. 105 f.

we come to deal with the case of joint sale and hire.¹

(4) D. (45. 2) 9. Papinian. XXVII. quaest.

pr. α. Eandem rem apud duos pariter deposui
utriusque fidem in solidum secutus, vel
eandem rem duobus similiter commodavi :
fiunt duo rei promittendi,

β. quia non tantum verbis stipulationis [*sed et
ceteris contractibus, veluti emptione venditione,
locatione conductione, deposito, commodato,
testamento ut puta si pluribus heredibus
institutis testator dixit : "Titius et Maevius
Sempronio decem dato"*] <~>.²

§ 1. γ. Sed si quis in deponendo penes duos pacis-
catur ut ab altero culpa quoque praestaretur,
verius est non esse duos reos, a quibus inpar
suscepta est obligatio :

δ. <- + >.³

ε. non idem probandum est [*cum duo quoque
culpam promisissent, si alteri postea pacto
culpa remissa sit*] <~>,⁴

ζ. quia posterior conventio, quae in alterius
persona intercessit, statum et naturam
obligationis, quae duos initio reos fecit,
mutare non potest :

η. <- > ⁵

θ. [quare] <~> ⁶ si socii sint et [*communis culpa*

¹ Vide infra, p. 313 ff.

² si conclusum sit quod agatur, ita fieri possunt.

³ (From ε) eoque iure utimur etiam si alteri postea pacto culpa remissa sit.

⁴ si ex intervallo ita pactus sit

⁵ quare si cum altero actum sit, alter liberatur, quamvis is dumtaxat quocum conventum est culpa nomine condemnari possit :

⁶ sed

intercessit] <~>,¹ etiam alteri pactum cum altero factum [*proderit*] <~>.²

§ 2. 1. [*Cum duos reos promittendi facerem ex diversis locis, Capuae pecuniam dari stipulatus sim, ex persona cuiusque ratio proprii temporis habebitur*] <~>³:

κ. nam etsi maxime parem causam suscipiunt, nihilo minus in cuiusque persona propria singulorum consistit obligatio.

This fragment is one of the greatest difficulty but also of the greatest importance for the proper understanding of our subject.

In period α the mention of commodatum (vel . . . commodavi) is generally now regarded as interpolated,⁴ but it does not seem to me by any means impossible, and I am therefore prepared to let it stand. Levy⁵ questions the genuineness of the statement that co-depositaries (co-commodataries) become “duo rei **promittendi**,” and suspects that the Compilers have either suppressed a “quodammodo” or “quasi,”⁶ or have inserted the “promittendi.” He

¹ *depositori agenti compensatio opponatur*

² *nocebit*

³ *Sed et si in continenti pactus fuerit ut ab utroque praestetur culpa propria ipsius, non etiam alterius, verior sententia est duos reos non fieri*

⁴ Levy, *Konk.*, p. 205, thinks the interpolation “as good as certain”; so also Albertario BIDR. 25, p. 24.

⁵ *Loc. cit.*

⁶ I do not like the suggestion that Papinian wrote “quodammodo” or “quasi,” because these terms might imply that the co-depositaries (co-com.) were qualified correal debtors enjoying a beneficium divisionis; cp. D. (26. 7) 45: “sed haec in magistratibus tractavi quasi (as if) duo rei eiusdem debiti essent **omnimodo**; quod non ita est. . . .” But co-depositaries (co-com.) were absolute correal debtors, just as though they had been taken bound by verbal contract. Levy, *Konk.*, p. 206, n. 2, refers to D. (13. 6) 5. 15: “quare duo quodammodo rei habebuntur,” but these words I believe to be interpolated (*infra*, p. 290); to D. (13. 5) 16 pr.: “si duo quasi duo rei constituerimus,” but the

admits, however, the possibility of the expression "duo rei promittendi" having been used by Papinian in a wide sense to cover correal debtors in general, and this I think is the sounder view. Correality from real and consensual contracts was undoubtedly modelled after stipulatory correality, and the extended application of the term "duo rei promittendi" is perfectly intelligible.¹

The three elements in the statement of facts are (i) "eandem rem apud duos deposui (commodavi)"; (ii) "pariter"; and (iii) "utriusque fidem in solidum secutus." These require separate attention.

(i) The fact that the deposit—we omit all further reference to commodate—was joint, is obvious; the word "pariter" expressly states this, though here it has a further connotation about to be explained.

(ii) "Pariter," though as a rule it signifies nothing more than "simul," must, as the "inpar" in γ and the "parem" in κ show, here also connote "equality of prestation," "objective equality of obligation," in particular equality of liability where the article is

words "quasi duo rei," if genuine (they are in all likelihood a gloss or interpolation), mean nothing more than "as correal debtors"; to D. (21. 1) 31. 10: "si quasi plures rei fuerunt venditores," but this passage is interpolated (*infra*, p. 305); to D. (30) 8. 1 (*supra*, p. 145): "quasi si duo rei promittendi in solidum obligati fuissent," but "quasi" here means "just as."

¹ The classical jurists seem to have used the expression *duo rei credendi* to denote correal creditors in general, but not the corresponding expression *duo rei debendi*; accordingly *duo rei promittendi* had to do general duty in the passive case. See Paul. D. (3. 3) 42. 5: "ex (sc. duobus) reis credendi—ex duobus reis promittendi"; likewise in Paul (4. 8) 34 pr. (*supra*, p. 144) we find the expression "duo rei credendi," where the following words "aut debendi" are certainly interpolated. As regards the last-mentioned passage, Levy, *Konk.*, p. 384, thinks it possible that the Compilers have substituted "credendi" for "stipulandi," and refers to *Bas. VII. 2. 34* (*Heimb. I.*, p. 259), where the word *ἐπερωτώντων* is used; this suggestion seems, however, quite unnecessary in view of D. (3. 3) 42. 5 (cit.).

not restored at all or is restored in a defective state.¹ In other words, both co-depositaries must be liable for dolus—this is the measure of liability which the law itself will impose on a depositary in the absence of special agreement—or both must be liable for culpa also, and so forth.

(iii) The phrase “utriusque fidem in solidum secutus,” as we understand it, has two connotations. In the first place it implies an intention of the creditor’s to exclude partition, but this is quite a minor point; in D. (16. 3) l. 43² Ulpian treats the exclusion of partition as a matter of course. In the second place, however—and this is the important point—the phrase in question seems to imply an intention on the creditor’s part to hold the co-depositaries “extensively responsible” for all loss of, or damage to, the article; if the latter is not restored at all, or is not restored in a proper state, the depositor, unless the loss or damage shall have arisen through a cause for which the depositaries are not responsible, looks to each for recovery of his full interesse, no matter which of them has actually been at fault.

We must entirely dismiss the idea, current in former times, that the phrase “utriusque fidem in solidum secutus” implies an express agreement to create solidarity in general or correality in particular, for actually its implication is just the reverse. What Papinian in effect says is that, assuming a joint contract and equality of prestation, the creditor’s intention to hold each co-depositary liable for restoring the entire article and for making good any loss caused through the fault of the other as well as through that of himself, is decisive in rendering them correal debtors.

¹ Cp. Levy, *Konk.*, p. 207.

² *Supra*, p. 260 (period a).

Such an intention will be implied in the absence of any contrary term in the agreement, so that the position may be summed up by saying that correality belongs to the *naturalia* of an equal passive joint contract of deposit.¹ These results are perfectly unexceptionable, and offer no antinomy with those arrived at in the case of correality ex stipulatu. The only difference is that we are now dealing with negotia where the intentions of parties take the place of form. When we leave period α , however, our troubles begin.

That period β in its present form cannot be genuine is certain. The absence of a principal verb and the reference to "ceteri contractus" (which include testamentum!) are in themselves sure signs of interpolation. Riccobono² restores the text by in-

¹ Cp. Levy, *Konk.*, p. 208, and the following passages quoted by him (note 2) in illustration of the phrase "utriusque fidem in solidum secutus":—D. (12. 1) 1. 1: "alienam fidem secuti"; D. (17. 1) 21: "alienum (utriusque) mandatum intuitus"; eod. 53: "alterutrum mandatum secutus"; D. (19. 2) 47: "singulorum in solidum intuitum personam" (*infra*, p. 304); D. (42. 5) 24. 2: "fidem publicam secuti."

On account of the importance of the conclusions here arrived at, I shall attempt to drive the same farther home by means of a *reductio ad absurdum*. Suppose T. deposits an article with M. and S. jointly, but nothing is said as to the nature of the depositaries' liability. If M. and S. are not rendered ipso iure correal debtors, then only two other alternatives are possible—(a) simple solidarity and (b) partition. (a) According to our theory simple solidarity is only possible where there exists some element inducing "inequality" or "non-identification"; in the absence of such element, the relation, if solidary at all, must be correal (cp. *supra*, p. 245 f.). (b) The sole alternative which really requires consideration is therefore partition; but Ulpian, in D. (16. 3) 1. 43 (*supra*, p. 260, period α), distinctly lays down that a passive joint contract of deposit per se renders the co-depositaries liable singuli in solidum and not pro rata. Hence, in the case figured, any other result but correality is excluded. Under these circumstances the phrase "utriusque fidem in solidum secutus" cannot imply that a special agreement is necessary in order to establish correality; its actual implication then can only be as stated in the text.

² *Dal Diritto rom. class. al Diritto mod.* in *Annali del Sem. giurid. della R. Univ. di Palermo*, III.-IV., p. 691.

serting "duo rei fieri possunt" after "verbis stipulationis" and deleting merely the passage "ceteris contractibus . . . locatione conductione," so that the whole reads: "quia non tantum verbis stipulationis *duo rei fieri possunt*, sed et deposito, commodato, etc." Levy,¹ on the other hand, deletes the whole period of β . I venture to suggest that while Levy's proposal is too drastic—the initial words "quia . . . stipulationis" may perfectly well be genuine—that of Riccobono is not drastic enough.

As against Riccobono the following points may be urged: In the first place, there lurks in the words "deposito, commodato," at any rate the suspicion of a *petitio principii*:—co-depositaries and co-commodataries become correal debtors, because correality can be created by deposit and commodate. In the second place, the "et" in the final "Titius *et* Maevius . . . dato" clause is false from the classical standpoint and must be emended to "aut," while from the Justinianian standpoint it causes no surprise in view of C. (6. 38) 4 (particularly § 1*a*).² In the third place, the example "ut puta si . . ." is altogether inelegant; having first stated that "plures (more than two) heredes" had been instituted, the writer abruptly introduces two persons T. and M. as these heirs.³ Again it was quite unnecessary to digress from the main argument in order to give an example of correality *ex testamento*. In the fourth place Riccobono asserts⁴ that "under the classical law correality was impossible in the case of sale and hire, that is to say, in the case of consensual contracts, without a stipulation." This assertion, how-

¹ *Konk.*, p. 204 ff., so also Albertario, BIDR. 25, p. 23 f.

² Levy, l.c. (p. 204, n. 4).

³ Moreover "dixerit" would be slightly more elegant than "dixit," though this is quite a minor point.

⁴ L.c., n. 4.

ever, I believe to be unfounded, as our following section will show.¹ If then, as we believe, sale and hire were, as regards correality, governed by precisely the same principles as deposit, commodate, and testament, it is impossible to delete the reference to the former group without deleting the reference to the latter group also.

For these reasons I propose to eliminate the whole of period β after "stipulationis." As to what Papinian may actually have written, I venture to refer to the clause "tametsi quod inter eos ageretur verbis quoque stipulationis conclusum non fuisset"² of Papinian. D. (19. 5) 8, and to suggest "si conclusum sit quod agatur, ita fieri possunt." According to this restoration period β signifies that, in order for co-depositaries (co-commodataries) to be taken bound correally, a stipulation was not now required, as it doubtless had been at some earlier date.

The difficulties which the pr. of the fragment present are trivial as compared with those which now meet us in § 1.³ In period γ one of two co-depositaries undertakes by pact liability for culpa over and above his legal liability for dolus, and in period ϵ , as it stands, both co-depositaries do this, but the additional liability of one of them is subsequently remitted. This introduces the vexed questions regarding *pacta adiecta* in general and *pacta depositioni adiecta* in particular.⁴ I make the following

¹ *Infra*, p. 303 ff.

² Beseler, II., p. 163, treats this clause as interpolated, but, as at present advised, I cannot concur in his view.

³ The view of Albertario (BIDR. 25, p. 23 ff.) that § 1 is entirely due to the Compilers, cannot in my opinion be accepted; cp. Levy, *Konk.*, p. 205, n. 8.

⁴ See Siber, ZSS., 42, p. 80 ff., where references to the leading modern authorities will be found.

preliminary observations: (a) I believe that the late classical law permitted a depositary to assume by pact additional liability for culpa¹, though it did not permit him to be relieved from liability for dolus; (b) I believe that the basis of § 1 is genuine, inasmuch as Papinian did here actually deal with the case of a *pactum de culpa praestanda depositioni adiectum*; (c) It is certain that the original text has been fundamentally interpolated by the Compilers; in particular, periods ε and θ cannot have been written by Papinian in their present form.

Let us consider period ε in the first place. The clause "cum duo quoque culpam promississent" is impossible. "Culpam promittere" is ἀπαξ λεγόμενον and crude²; "promississent" properly connotes a stipulation, of which, however, there is no word here; "quoque" should come after, not before, "culpam." I cannot, however, admit that the "cum"-clause may simply be deleted, the fact of both parties having originally assumed additional liability for culpa being thus left to implication.³ On the contrary, if we pronounce this clause interpolated we must, I believe, further attribute entirely to the Compilers the position of fact complicated in period ε, namely, that both depositaries originally assumed additional liability for culpa, and that one of them, but not the other, subsequently had this additional liability remitted.

In the second place as regards period θ, considered in the light of the preceding periods ε and ζ, the line

¹ *Contra*, Albertario BIDR., 25, p. 15 ff.

² In D. (47. 8) 2. 23 i. f., "si in re deposita culpam quoque repromisi," Schultz, ZSS., 32, p. 36, thinks that "culpam" has been substituted for "custodiam."

³ This is apparently the view of Levy, *Konk.*, p. 205, n. 7, who holds the "cum"-clause "superfluous."

of argument seems to be as follows:—Both the co-depositaries, say M. and S., originally assumed additional liability for culpa, so that, their obligations being equal, they were duly constituted correal debtors; in such case a subsequent pact with one of them, say M., remitting the additional liability, cannot disturb the correal relation originally created; this is the purport of ϵ and ζ . Then in θ the deduction is drawn (quare) that if M. and S. are partners and S. is sued on the ground of culpa communis, he (S.) can plead the said pact in defence, for the obvious reason that, if condemned, he will have proportionate regress against M. in a iudicium societatis, and the pact will thus be rendered elusory.

Accordingly the decision in θ is inextricably bound up with the position of fact set forth in ϵ and must stand or fall with the latter. But we have three further grounds, the first purely formal, the second and third substantial, for refusing to attribute θ in its present form to Papinian.

(i) Is it likely, we ask, that a classical jurist would use the same verb “intercessit” in two different connections (conventio intercessit (ζ)—culpa intercessit (θ)) in the same immediate context? The inevitable negative answer at once renders the clause “et communis culpa intercessit” (θ) suspicious, for the genuineness of period ζ is, in our opinion, beyond dispute.¹ Moreover, the construction: “sint” (pres. subj.)—“intercessit” (perf. indic.) governed by the same “si” (θ), is at any rate remarkable.

(ii) We ask, On what legal principle can S., when sued on the ground of culpa, be heard to plead as

¹ We shall presently see cause to believe that a period originally intervened between ζ and θ , but this period would have to be of considerable length in order to remove the inelegance in question.

follows:—Yes, admittedly, I have been guilty of culpa, but M., who is my partner, has been guilty of the same culpa, and I, if condemned, shall have regress against him in a *iudicium societatis*; but you have by pact remitted M.'s liability for culpa, and my claim for regress will render this pact elusory; ergo I must be absolved. The plaintiff's answer is immediate: I am not concerned with any inner relation between you and M.; I am suing you in respect of culpa which is your own, and your liability for which has never been remitted. Hence we must regard θ as bad law.¹

(iii) The mention of culpa communis seems clearly to infer that it was only in the case of such culpa that S. would require permission to plead the pact in order to prevent it being rendered elusory. Actually, however, if the relation is governed by classical principles, S. requires permission to plead the pact for this purpose in another case, as the following argument will show:—

Certainly, where S. is the sole culpable party, the pact is not rendered elusory through his not being allowed to plead it; for, if condemned on the ground of his own culpa alone, he cannot claim regress against M. even where they are partners.² But, consider the converse case where M. is the

¹ The following question may be asked: Suppose the depositor has made the pact in full knowledge of the inner relation between M. and S. and of the regress rights which this relation carries with it; in such case, can equity properly intervene to prevent him attacking M. indirectly through S.? In other words, will equity prevent the depositor from suing S. at all on the ground of culpa communis, or at any rate limit the condemnation in this action to S.'s proper share of the liability, S. having then no regress against M.? For our present purposes, however, this point is immaterial, because we are here dealing with law, not equity.

² We may ignore the possibility of the partnership agreement specially providing for regress even in this case.

sole culpable party.¹ If M. and S. are partners, and S. is condemned on the ground of M.'s culpa alone, he will naturally have regress against M. in a iudicium societatis. Hence, if S. is liable to be so condemned, the pact will be rendered elusory unless he can plead it, though no culpa communis has occurred.

This raises the question, Can S. be condemned on the ground of M.'s culpa? Under the classical law, we believe, an affirmative answer must be given. Ex hypothesi, M. and S. are correal debtors, and as we have seen good grounds for thinking, extensive responsibility was an essential element in the passive correal relation under the classical law. Now S. (together with M.) has originally undertaken additional liability for culpa, and on classical principles this additional liability of S.'s must be deemed to cover M.'s culpa as well as his own, otherwise, according to our theory, correality would be excluded.² True, *M.'s personal liability for culpa* has been remitted³; but the remissory pact, having been concluded with M. alone, in no way affects S.'s *liability for M.'s culpa*, as originally undertaken. Hence, on an application of the classical doctrine

¹ Levy, *Konk.*, n. 5 (b) to p. 210 (at foot of p. 211), omits to consider this case; hence, though his criticism of Binder is sound so far as it goes, his own views regarding period θ must, in our opinion, be rejected.

² Because, if S. undertook additional liability for his own culpa without at the same time undertaking additional liability for M.'s, to this extent extensive responsibility, which we believe to be an essential element in classical correality, would be excluded; S.'s obligation bears an individualistic quality which prevents it being identified with the obligation of M. The position would be the same, if S. were to undertake additional liability for M.'s culpa, but not for his own. Cp. what is said *supra*, p. 94 f., regarding the correal stipulation.

³ Whether the remission covers M.'s liability for the culpa of both himself and S., or for that of himself only, or for that of S. only, depends, of course, on the terms of the pact.

of extensive responsibility, it was not only in the case of culpa communis that S. required permission to plead the pact in order to prevent it being rendered elusory; such permission was equally necessary in the case where M. alone had been guilty of culpa, and S. was sued in respect thereof.

In point of fact, then, period θ only becomes intelligible if we assume that liability for culpa was "intensive" merely, so that S. could be condemned where the culpa was on the part of himself alone, or on the part of himself and M., but not where it was on the part of M. alone. This, as we have good grounds for believing, was actually the rule under the Justinianian law.¹

Now, we have to ask ourselves what may have been the original purport of Papinian's argument in § 1? As at present advised, I can see only one answer to this question, namely, there were here contrasted a pact *de culpa praestanda* made with one of the co-depositaries at the time of the original contract and a similar pact made *ex intervallo*. I do not think it is in any way necessary to interfere with the words "in deponendo penes duos" in γ ,² but I would make ϵ read: "non idem probandum est *si ex intervallo ita pactus sit*."

¹ *Vide supra*, pp. 82 ff., 228 f., 253.

² *Contra*, Levy, *Konk.*, p. 205; cp. Heumann-Seckel, p. 415, s.v. *penes*. In my opinion it is hypercritical to object to "penes" as coming in place of "apud." Moreover, if I am right in retaining the reference to commodate in α , some such words as the present were necessary in order to mark the restriction of the sequel to the case of deposit. The present words also serve to mark the pact as contemporaneous with the original contract.

It may be observed that the sequence of tenses "paciscatur"—"praestaretur" does not afford any ground for objection; see Kalb, *Wegweiser*, p. 76.

With this restoration, § 1 (apart from θ , which will be considered again presently) becomes perfectly intelligible. In period γ the pact, being made at the time of the original contract, is part of the latter. Hence, an inequality of prestation is introduced which seems to exclude the possibility of correality. Now, if M. and S. are not correal debtors, what are they? In our opinion only one answer is possible, namely, that they stand in a relation of simple solidarity. Very likely Papinian explained this result in some part of the context.¹

In periods ϵ (as restored) and ζ , on the other hand, nothing was originally provided as to additional liability and M. and S. were duly constituted correal debtors; by a subsequent pact, however, M. undertakes additional liability for culpa. The decision here is that this pact cannot disturb the correal relation originally established.

But, we at once ask, what is the effect of this subsequent pact? A Justinian lawyer would no doubt answer that it is invalid for purposes of action, but valid, by way of exception, for purposes of defence. Under the classical law, however, it would appear that in the case of contracts sanctioned by a *bonae fidei iudicium*, a subsequent pact *pro actore* (otherwise described as a pact *ad augendam obligationem*) was valid for purposes of action; that is to say, if the creditor sued on the original contract the

¹ The guarded manner (*verius est*) in which Papinian denies the existence of correality is deserving of note; it suggests that, in the case of formless negotia, some jurists upheld the existence of correality in spite of the inequality of "secondary" liability. Indeed, it was only natural that the dividing line between correality and simple solidarity should be the subject of a certain amount of controversy, especially as the latter relation was entirely the result of juristic elaboration, being unknown to the strict civil law. We may, however, take it that Papinian's view represents the preponderance of juridical opinion.

iudex was entitled and bound to take into consideration any pactum ex intervallo adiectum by which the defendant's liability had been increased, just as he was entitled and bound to take into consideration a similar pactum in continenti adiectum.¹ And in point of fact period ζ, as we understand it, implies that the subsequent pact was valid for purposes of action, otherwise there could be no question of it disturbing the original correal relation.

If all this be sound, then, in the case figured in ε (as restored) and ζ, we have a correal relation subsisting in spite of an inequality of prestation introduced ex post facto; M. and S. are still mutually liable for dolus, and litiscontestation with the one frees the other. The only difference now is that if the depositor sues S., he can only recover on the ground of dolus of either party, whereas if he sues M., he can recover not merely on the ground of dolus of either party, but also on the ground of culpa—whether the culpa of either party, or of M. alone, or of S. alone, depends on the terms of the pact. These results, it seems to me, are perfectly reasonable and in accordance with the spirit of the classical law. A correal relation once established is always established, and no subsequent modification of the liability of one party can in any case subvert the same.

¹ The iudex in a iudicium strictum had, of course, no such power.

Limits of space entirely preclude any discussion regarding the classical rule that, in the case of contracts sanctioned by a bonae fidei iudicium, a pactum pro actore ex intervallo adiectum was valid for purposes of action in the sense just explained, and the opposing Justinianian rule that such a pact merely gave rise to an exception. I merely refer to Biondo Biondi, *Iudicia Bonae Fidei* in *Annali del Sem. giurid. della R. Univ. di Palermo*, VII., p. 22 ff., and Siber, ZSS. 42, 80 ff., where the whole subject is thoroughly dealt with. I would further observe that all previous expositions regarding pacts must now be read in the light of the new analysis given by Riccobono, ZSS., 43, p. 338 ff.

The foregoing restoration of ϵ leaves θ meaningless; how could M.'s undertaking of additional liability for culpa ever "benefit" S.? It would, however, be contrary to sound methods of textual criticism to assume that period θ is wholly due to the Compilers; on the contrary, we must proceed on the supposition that Papinian said something as to the effect of M.'s subsequent pact on S.'s position, and that the Compilers adapted his words to suit their previous interpolations. The most obvious experiment is to substitute "nocebit" for "proderit." Taking the remainder of the period as it stands, the meaning would then be that, where M. and S. are partners and the depositor sues S., the latter, in the event of culpa communis being established, may be condemned by virtue of M.'s pact; the argument in favour of this view is that S. will have regress against M. in a *iudicium societatis*. Any such view must, however, be rejected absolutely; S., being a stranger to the pact, can never be condemned by virtue thereof.

The only way in which we can fit in θ with our other restorations apparently is to regard it as referring to the case where S., on being sued, claims compensation for expenses etc. incurred in connection with the deposit,¹ or some similar case, the substitu-

¹ As to this matter see Biondo Biondi, *op. cit.*, p. 122. It seems clear that, under the classical law, a depositary could not institute an independent *iudicium contrarium* in *ius* for expenses, etc., incurred in connection with the deposit, and that only under special circumstances would a *iudicium contrarium in factum* be granted (*vide supra*, p. 243 f.). Normally, the depositary's course was to refuse to restore the thing deposited until his expenses were paid, so that the depositor had the choice either of abandoning the thing to the depositary, or of settling the latter's claim in return for restoration of the thing, or of raising an action. If the last of these three courses were adopted, the depositary could oppose his claim for expenses to the depositor's claim for restoration of the thing, and, if he did so successfully, the amount of the eventual condemnation would be proportionately reduced.

tion of "nocebit" for "proderit" being retained. The question then is, Can the depositor set-off against S.'s claim for compensation a counter-claim for loss through culpa for which M. is responsible under the pact? If M. and S. are partners, it seems highly equitable that such a set-off should be allowed. If the same be not allowed, the pact will be rendered elusory, because M., as S.'s partner, will share in the amount recovered by S. from the depositor,¹ without any deduction on the ground of culpa for which he (M.) has assumed liability. Accordingly, S.'s claim against the depositor must, it is thought, be reduced by the amount of the depositor's claim against M. under the pact, S. having, in respect of this reduction, regress against M. in a iudicium societatis.

This interpretation of θ involves the deletion of the "communis culpa intercessit" clause which we have seen to be questionable on other grounds.² It also implies that Papinian wrote something (period η) between ζ and θ . The following restoration of periods η and θ is suggested for what it is worth: "*quare, si cum altero actum sit, alter liberatur, quamvis is dumtaxat quocum conventum est culpae nomine condemnari possit: sed si socii sint et depositori agenti compensatio opponatur, etiam alteri pactum cum altero factum nocebit.*"

Another, though comparatively unimportant, point of restoration is suggested by the words "si alteri postea pacto culpa remissa sit" in ϵ . These words may perfectly well be genuine, and possibly they referred, in Papinian's text, to the case where M. (but not S.) originally undertook additional liability

¹ Recovered, that is to say, either directly where the depositor makes a payment in return for restoration of the thing, or indirectly where the condemnation is proportionately reduced.

² *Vide supra*, p. 273 ff.

for culpa, but this additional liability was subsequently remitted. It may be that Papinian mentioned this case incidentally in a deleted period δ , and we ask, How was the same likely to have been decided? Arguing *e contrario* from ζ , we think it probable that if correality were originally excluded by inequality, the same could never be induced *ex post facto*. If this view be adopted, Papinian may after γ have proceeded: "*eoque iure utimur etiam si alteri postea pacto culpa remissa sit.*"

Assuming the substantial soundness of the foregoing restorations, we must now consider the Compilers' mode of dealing with § 1.

In the first place, we revert¹ to the fact that the Compilers should have changed Papinian's denial of a *duo rei* relation in γ to an affirmation thereof, the classical distinction between correality and simply solidarity being now non-existent. Actually the whole contrast in periods γ and ϵ (in its new form) is, from the Justinianian standpoint, meaningless: for in both cases alike the relation must be one of Justinianian correality.

In the second place, with regard to the manipulations of periods $\epsilon - \theta$, we make the following observations:—

According to the rule adopted by the Justinianian law a *pactum pro actore depositioni ex intervallo adiectum* was invalid for purposes of action, so that obviously it could not disturb the correal relation originally established. But Papinian, as we suppose, treated such a pact as valid for purposes of action, and based its incapacity for disturbing the correal relation merely on the special ground set forth in ζ . Hence a revision of his decision seemed necessary.

¹ *Vide supra*, p. 236.

In what manner, then, did the Compilers carry out their revision? As we shall presently see grounds for thinking, Papinian in § 2 (period ι) dealt with the case where both M. and S. had originally assumed additional liability for culpa, though each for his own culpa alone. The mention of this case the Compilers deleted, but here, I conjecture, they got a cue for a suitable interpolation of § 1. Why not introduce the case where M. and S. both originally undertook additional liability for culpa, but M. subsequently had this additional liability remitted? This course would be all the more readily suggested if, as we suppose, Papinian had previously, in the deleted period δ , mentioned the case where an original undertaking of additional liability had subsequently been remitted. And so, I conjecture, the Compilers utilised period ζ as the motive for a perfectly new decision; we shall presently see cause for thinking that in § 2 they utilised period κ in a precisely similar manner. If all this be sound, their omission of period η , and likewise their adaptation of period θ to suit their previous interpolations and the new rule of "intensive" responsibility, need not cause any serious difficulty.

Finally, it is interesting to speculate how Papinian would have decided the case where both M. and S. originally undertook additional liability for culpa, but M. subsequently had this additional liability remitted. Would the inequality induced ex post facto have disturbed the correal relation originally established? We think not, so that, if this answer be sound, the Compilers' decision in ϵ is perfectly good classical law.

We now turn to § 2, which at first sight presents

just as great difficulties as § 1, though I believe I have found the key to their solution.

That period *ι* was not written by Papinian in its present form, may be pronounced certain. In the first place, we note the abrupt change from solidarity *ex deposito* to solidarity *ex stipulatu*. In the second place, the grammatical construction “*cum . . . facerem . . . stipulatus sim*” is impossible,¹ and the combination of “*duos reos facere*” and “*stipulari*” (the latter signifying nothing more than “to provide in the contract”) intolerable. In the third place, the words of the period seem plainly to refer (primarily at any rate)² to the case where, for example, T. at Constantinople by means of separate written acts takes M. and S. correally bound “from” Rome and Carthage respectively, the place of payment being Capuae; in this case, it is held, different suspensive terms must be implied in favour of the respective debtors. Such a position was absolutely inconceivable under the classical law, but quite practicable under the Justinianian law, as we have already seen.³

But what did Papinian here write? To answer

¹ Mommsen reads “*stipulatus sum*,” and Krüger simply deletes “*sim*,” but all such emendations are hopeless. The Compilers seem to have made a futile attempt to copy Papinian’s style; cp., *e.g.*, the opening words of §§ 5 and 6 of D. (47. 2) 14. (Ulpian quoting Papinian).

² They might also cover the following case:—M., an inhabitant of Rome, and S., an inhabitant of Carthage, happen to be in Constantinople together, and they there make a correal promise to T., the place of payment being Capua. In such case the Justinianian law may quite well have treated the two obligations as subject to different implied suspensive terms, sufficient to allow M. and S. to have the money forwarded from Rome to Capua, and from Carthage to Capua, respectively (cp. Binder, p. 8, n. 22). Apparently, however, the classical law would here imply only a single suspensive term, namely, that sufficient to allow M. and S. to proceed from Constantinople to Capua, no allowance being made for time required to procure the money from elsewhere; cp. Venuleius D. (45. 1) 137. 4.

³ *Supra*, p. 215 f.

this question let us turn to period κ , which has every appearance of being genuine. Obviously this period is meant to serve as a motive for the preceding decision that the obligations of M. and S. are subject to different implied suspensive terms. So regarded it must be construed thus: "for though M. and S. are objectively correal debtors, each is party to a separate subjective relation," the inference being that the two subjective relations must, if circumstances so require, be qualified differently. This construction, however, seems quite impossible. What Papinian actually says is: "for though M. and S. undertake precisely equal liability, yet each is the subject of an obligation peculiar to himself,"¹ and to these words only one meaning can, I believe, be attached, namely, that the two obligations, though equal, are not constructively one and the same, are not correally related.

Here, it is thought, we get the key to the restoration of ι . In the pr. of the fragment the conditions necessary in order that a joint contract of deposit (or commodate) may produce correality are contained in the words "*pariter*" and "*utriusque fidem in solidum secutus*." In § 1 Papinian mentions the case where correality is excluded on the ground of "inequality": *non esse duos reos a quibus inpar suscepta est obligatio*. What then would be more natural that in § 2 he should proceed to deal with the case where correality is excluded because the depositor cannot be described as "*utriusque fidem in solidum secutus*"? Now, there are two opposites to "*utriusque fidem in solidum secutus*," namely, (*a*) partition, and (*b*) solidarity without unity of obliga-

¹ Cp. Papinian. D. (45. 3) 18. 3: "*singulorum annorum initio cuiusque anni pecunia fructuario quaereretur*."

tion and hence without extensive responsibility, in other words, simple solidarity. Partition may be left out of account as a remote possibility, and one which called for no special discussion.¹ We therefore conclude that period ι as written by Papinian dealt with the case where M. and S. originally undertook equal liability with regard to the whole "res," but a special agreement was made which excluded identification of the two obligations and rendered the solidary relation merely simple.

What, then, may this special agreement have been? I venture to suggest it as highly probable that here both M. and S. originally undertook additional liability for culpa, so that the two obligations were rendered precisely equal (*maxime parem causam suscipiunt*), but that the additional liability of each was expressly restricted to his own culpa and did not cover that of the other, so that the extensive responsibility essential to a correal relation was absent. Here we have literally the situation contemplated in κ, and I would therefore restore ι somewhat thus: *Sed et si in continenti pactus fuerit ut ab utroque praestetur culpa propria ipsius, non etiam alterius, verior sententia est duos reos non fieri.* When such an agreement as is here contemplated had been made, the depositor could not be described as "utriusque fidem in solidum secutus" within the meaning of the classical law, and hence the relation of the co-depositaries was reduced to one of simple solidarity.

Two special merits are claimed for this conjecture: (i) it gives the fragment as a whole a perfect concinnity in all respects worthy of Papinian, and (ii) it explains where the Compilers got the idea of an

¹ Cp. *supra*, pp. 241 f., 268 f.

undertaking of additional liability for culpa by both depositaries, which idea they have utilised in their interpolation of period ϵ .

If my restorations are in any way well founded, it is undeniable that the present fragment provides a most valuable contribution to our knowledge of the classical conceptions of correality and simple solidarity. The inscription of the fragment is significant. The twenty-seventh book of Papinian's *Quaestiones* dealt largely with obligations ex stipulatu, and Lenel¹ seems quite justified in giving this fragment the rubric "de duobus reis constituendis." In all probability the context raised certain fundamental questions regarding correality and simple solidarity, and the case of real contracts, in particular of deposit, was introduced because of the facility with which these lent themselves to illustrate "inequality" and "non-identification" in a joint contract. The formal considerations which played an all-important part in solidarity ex stipulatu did not arise here, and everything depended on what the parties had actually agreed. Again, legally a depositary was liable for dolus only but might by pact undertake additional liability for culpa, and pacts of this description could readily be employed in such manner as to induce "inequality" or "non-identification."

If we assume Papinian to have written period ι substantially as I have restored it, the Compilers could not properly leave the decision standing, because extensive responsibility was not an incident of the correal relation under the Justinianian law. We must then, in conclusion, consider the question where they got their idea for the interpolation of this period.

¹ *Pal.* I., col. 869.

The answer to this question is, I venture to think, to be found in D. (46. 1) 49. 2, also taken from the 27th book of Papinian's *Quaestiones*. In this latter paragraph Papinian discusses the following highly technical problem :—

M. promises at Capua to pay T. a certain sum at Capua ; S. promises at Rome to pay T. the same sum at Capua as fideiussor for M. The debt being immediately due and M. being at Capua, T. is entitled to bring an action against M. at Capua immediately. But suppose T. prefers to sue S., who is at Rome, by means of an “*actio arbitraria*.” We then ask, (i) Is T. entitled to bring this action against S. at Rome immediately, or (ii) must he wait until sufficient time has elapsed to enable S. to proceed to Capua, the place of payment, should he (S.) desire to do so? Papinian decides in favour of the second alternative. M., if he were at Rome, could not be sued there in an *actio arbitraria* until sufficient time had elapsed to enable him to proceed to Capua, should he desire so to do, and in the case actually figured a similar suspensive term must be implied in S.'s favour. The motive is expressed thus : “*nam e contrario quoque si quis responderit, quoniam debitor Capuae sit, fideiussorem confestim teneri, non habita ratione taciti proprii temporis, eventurum ut eo casu fideiussor conveniatur quo debitor ipse, si Romae fuisset, non conveniretur.*” Founding on this decision the Compilers formulate the general rule thus : “*itaque nobis placet fideiussoriam obligationem condicionem taciti temporis ex utriusque persona recipere tam rei promittendi quam ipsius fideiussoris . . .*”¹

¹ That this passage is due to the Compilers seems certain ; so also Pampaloni, *Archivio giuridico*, 55, p. 512 ; Krüger, *Dig.*, App. IV. With D. (46. 1) 49. 2, there should be compared African. D. (13. 4) 8 ;

Now there is a striking similarity between the language of D. (46. 1) 49. 2 and that of period ι of our fragment, which must be obvious to any reader, and the view which I venture to submit is that in period ι the Compilers have deliberately utilised the decision in D. (46. 1) 49. 2 as a basis for an analogous decision concerning the relation of *duo rei promittendi*. Under the classical law, indeed, no analogy was possible between the two cases, because a *fideiussor* could bind himself at a different time and place from the principal debtor, whereas the constitution of a principal correal relation by verbal contract demanded the presence of all parties at the same time and place. On the other hand, under the Justinianian law, which permitted the creation of correalty by separate acts, the analogy between the case where a principal debtor and *fideiussor* bind themselves at different places, and that where two principal correal debtors do so, is obvious at once. It is, however, equally obvious that these two cases, though analogous, are not exactly parallel. A *fideiussor*, by virtue of his accessory position, is entitled to the benefit, not merely of any suspensive term implied in his own favour, but also to the benefit of any such term implied in favour of his principal debtor, though a principal debtor is not entitled to the benefit of a suspensive term implied in his *fideiussor's* favour. On the other hand, as two correal debtors stand on a co-ordinate footing, each can only be entitled to the benefit of a suspensive term implied in his own favour, and never to the benefit of such a term implied in favour of the other alone. Hence from the Justinianian

see as to the latter fragment Biondo Biondi, *Sulla Dottrina romana dell' "Actio arbitraria,"* in *Annali del Sem. giurid. della R. Univ. di Palermo*, I., p. 54 ff.

standpoint, the decision in ι as it stands is perfectly intelligible.

To sum up, the Compilers, finding that they had to delete Papinian's original decision in ι, conceived the brilliant idea of substituting therefor a decision in the case where two correal debtors had bound themselves "from" different places. The motive set forth in κ seemed to them quite capable of supporting this latter decision, which could then go forth to the world bearing the imprimatur of the great Papinian. If my conjectures be sound, this fraud, which so far as I am aware has hitherto escaped detection, is laid bare at last.

(5) D. (13. 6) 5. 15. Ulpian. XXVIII. ad edict.

α. Si duobus vehiculum commodatum sit [*vel locatum*] simul, Celsus filius scripsit libro sexto digestorum quaeri posse utrum unusquisque eorum in solidum an pro parte teneatur.

β. *et ait duorum quidem in solidum dominium vel possessionem esse non posse: nec quemque partis corporis dominum esse, sed totius corporis pro indiviso pro parte dominium habere. usum autem balinei quidem vel porticus vel campi uniuscuiusque in solidum esse (neque enim minus me uti quod et alius uteretur): verum in vehiculo commodato vel locato pro parte quidem effectum me usum habere, quia non omnia loca vehiculi teneam.*¹

γ. sed esse verius ait et dolum et culpam [*et diligentiam*] et custodiam in totum *me*² praestare debere:

¹ Period β after "et ait" radically interpolated.

² ? *Vide infra*, p. 293.

δ. quare [*duo quodammodo rei habebuntur et*]
 $\langle \sim \rangle$ ¹ [*si*] alter conventus [*praestiterit*]
 liberabit alterum, et ambobus competit furti
 actio,

D. eod. 6. Pomponius V. ad Sabin.

ε. ut alterutro agente alterius actio contra furem
 tollatur.

D. eod. 7. Ulpian. XXVIII. ad edict.

pr. ζ. Unde quaeritur, si alter furti egerit, an ipse
 solus debeat commodati conveniri.

η. et ait Celsus, si alter conveniatur qui furti
 non egit, et paratus sit $\langle - \rangle$ ² periculo
 suo conveniri alterum qui furti agendo
 lucrum sensit ex re commodata, debere
 eum audiri [*et absolvi*].

§ I. θ. Sed si [*legis Aquiliae adversus socium eius habuit
 commodator actionem*] $\langle \sim \rangle$ ³ videndum erit
 ne $\langle - + \rangle$ ⁴ cedere debeat, $\langle - \rangle$ ⁵

ι. [*si forte damnum dedit alter, quod hic qui
 convenitur commodati actione sarcire com-
 pellitur* :

κ. [*nam et si adversus ipsum habuit Aquiliae
 actionem commodator, aequissimum est ut
 commodati agendo remittat actionem* :

λ. [*nisi forte quis dixerit agendo eum e lege*

¹ si furtum fit, unusquisque eorum in solidum tenetur, perinde ac si alteruter culpa sua rem commodatam deteriore fecisset: sed

² cavere

³ culpa alterius res commodata deterior facta sit, et alter eo nomine condemnatur

⁴ alteri condemnato quam adversus alterum habuit commodator actionem, rescisso superiore iudicio,

⁵ et verius est debere, dummodo sine ulla condemnati ipsius culpa damnum datum sit.

Aquilia hoc minus consecuturum, quam ex causa commodati consecutus est : quod videtur habere rationem.]

If by a single joint contract T. lends an article to M. and S. "pariter" and "utriusque fidem in solidum secutus" within the meaning of D. (45. 2) 9 pr.,¹ then without doubt the co-commodataries are liable correally just as in the case of deposit. The question raised in period α of our present fragment seems then to be whether the second of the above conditions can be deemed fulfilled in the ordinary case of a loan of a carriage to two parties. Suppose M. and S. wish to proceed, say, from one part of Rome to another, and T. lets them use his carriage for this purpose. Is it reasonable in such a case to regard T. as "utriusque fidem in solidum secutus?" Should we not rather say that each of the co-commodataries has been granted the use merely of a proportionate share of the carriage, and is responsible for such share alone? This question introduces intricate problems regarding the liability of commodataries in general, into which problems we must refrain from entering in this work; all we can here do is to try and discover the actual results attained by the jurists.

As regards period α the mention of the case of locatio ("vel locatum") seems to be an interpolation, but I see no reason to interfere with "simul."²

Period β in its present form is clearly the work of the Compilers,³ who seem to have both abridged Celsus's original argument and added fresh matter. I do not propose to attempt any restoration, and

¹ *Vide supra*, p. 267 ff.

² Cp. Ulpian D. (47. 2) 14. 7 : "si duo servi subrepti sint simul."

³ See Kübler in *Festgabe f. Gierke*, p. 257, n. 2 (separate impression, p. 21, n. 2); Levy, *Konk.*, p. 213; Haymann, *ZSS.*, 40, p. 219.

merely note Riccobono's suggestion¹ that Celsus in the course of his argument may have dealt with the case of a locatio of immovables; if this suggestion be well founded, the addition of the words "vel locatum" in *a* and also the mention of locatio ("vel locato") in the present period are easily explained.

In period *γ* Celsus clearly reaches the result that either co-commodatary is responsible in full for loss of, or damage to, the carriage. The hand of the Compilers is, however, here evident; no classical jurist would, we may be certain, have let *dolus* and *culpa* on the one hand, and *diligentia* on the other, be governed by the same *praestare*.² If, however, we simply delete

¹ *Dal Dir. rom. class. al Dir. mod. in Annali del Sem. giurid. della R. Univ. di Palermo*, III.-IV., p. 691, n. 4.

² For then we have a harsh "zeugma"; that is to say, in the phrase *culpam (dolum) praestare*, *praestare* signifies "to be answerable for," whereas in the phrase *diligentiam praestare* it signifies "to show" (see Haymann, ZSS., 40, p. 188). On the other hand, the phrase *custodiam praestare* has a special technical value which covers both these meanings, namely, "to show every possible care in safeguarding the thing, and to be answerable for all loss of, or damage to, the same, unless such loss or damage occurs through circumstances which the law regards as exonerating." *Custodiam praestare*, it therefore seems, could properly be combined either with *culpam (dolum) praestare* or with *diligentiam praestare*. Thus, in the partly interpolated D. (16. 3) 1. 35, the words "non solum dolum, sed etiam culpam et custodiam praestet" may be genuine (cp. Haymann, l.c., n. 4; *contra* Albertario BIDR., 25 p. 21 f.); and in Paul. *Sent.* II. 4. 3 it is said "custodia enim et diligentia rei commodatae praestanda est." The Compilers undoubtedly sought to mitigate the rigour of the classical "custodia-liability" in various ways. As regards our present period a plausible suggestion is that they meant to substitute "diligentiam" for "custodiam," but inadvertently omitted to delete the latter word. A clear example of such a substitution is to be found in D. (13. 6) 5. 9: "Usque adeo autem [*diligentia*] <*custodia*> in re commodata praestanda est . . . : (*i. f.*) etiam pulli te custodiam praestare debere veteres responderunt"; here the Compilers have carelessly left standing the reference to custodia at the end of the paragraph, so that the interpolation at the beginning thereof is plainly revealed (see Heumann-Seckel, p. 117, s. v. *custodia* aa); Haymann, ZSS., 40, p. 188). An alternative, though I think less likely, mode of restoring our present period would be to eliminate "dolum et culpam" and retain "diligentiam."

“et diligentiam” the period becomes at least tolerable. Haymann¹ marks “in totum” with a point of exclamation (!), but I do not see any real objection to these words in themselves;² he also marks “me” in the same manner, but owing to our ignorance of the original contents of β it is impossible to say whether or not this word is genuine.

In period δ Ulpian proceeds to give deductions (quare) from the decision of Celsus. That the reference to solutio-consumption in this period cannot be genuine is obvious,³ but by simply deleting “si” and “praestiterit” we at once restore the classical process-consumption. In my opinion, however, this restoration by no means cures all the faults of the period. We note the following points:—

(i) What is the significance of the term “quodammodo”? The only possible answer seems to be that we must supply “promittendi” with “duo rei” and then understand “quodammodo” as connoting an analogy with correal debtors by verbal contract. But it is very doubtful whether a classical jurist would have employed such terminology; the word “quodammodo” might be construed in the sense that co-commodataries were but qualified correal debtors enjoying a beneficium divisionis, though such a view would certainly be false.⁴

(ii) The statement that the co-commodataries are correal debtors renders superfluous the immediately

¹ ZSS., 40, p. 219.

² Cp. D. (47. 2) 14. 7: “in totum.” Heumann-Seckel, p. 117, s. v. *custodia* aa, understand “vehiculum” with “totum” in our present period, and this view may quite well be sound.

³ “Praestiterit” has no object; moreover, in the text as it stands, “conventus” is superfluous and misleading, the reference being to solutio-consumption; hence the fact of interpolation is manifest.

⁴ Cp. *supra*, p. 266, n. 6.

following statement (as restored) that *litiscontestatio* with the one frees the other, for the classical institute of correalty depends essentially on extensive process-consumption.

(iii) The future tense “*habebuntur*” is somewhat loosely employed; strictly speaking the present is required. This objection does not apply to the subsequent “*liberabit*,” which contemplates *eventual* judicial proceedings. The Compilers’ general predilection for the future tense is well known; and here the example of “*liberabit*” would afford them a particular inducement to employ this tense in the preceding “*duo quodammodo rei habebuntur*” clause, assuming the latter to have been written by them.

(iv) The introduction of the case of theft at the end of the period is very abrupt; in fact it seems almost certain that Ulpian had already mentioned this case earlier in the period.

(v) The construction of the period (three co-ordinate principal clauses each with a different subject and connected by means of a double “*et*”) shows a lack of style.

I therefore conclude that the words “*duo quodammodo rei habebuntur et*” are due to the Compilers. What Ulpian wrote is, of course, altogether uncertain. I give the following conjectural restoration for what it is worth: “*quare si furtum fit, unusquisque eorum in solidum tenetur, perinde ac si alteruter culpa sua rem commodatam deteriorem fecisset.*” Ulpian may then have proceeded: “*sed alter conventus liberabit alterum, etc.*” If this restoration be in any way well founded, we must assume that the Compilers sought to eliminate all suggestion of extensive responsibility for culpa, and, in place of the deleted clauses, introduced the banal statement “*duo quodammodo rei habebuntur.*”

The next question we naturally ask is whether the co-commodataries are entitled *singuli in solidum* or *pro rata* against the thief. Whether Ulpian here discussed this question it is impossible to say, but at any rate the decision was in favour of solidarity. As the co-commodataries were liable *singuli in solidum actione commodati*, they must also be entitled *singuli in solidum actione furti*. Ulpian did not find it necessary to state expressly the determination of the concurrence of the two *actiones furti*, but in fr. 6 (period ε), the Compilers have introduced a quotation from Pomponius giving a determination in the sense of process-consumption.¹ By so doing they evince their adherence to the principle that *litiscontestatio* has an occupatory effect in the case of active *correality*.²

In period ζ the question is raised whether, if one of the co-commodataries, say M., has sued the thief for the full two-fold or four-fold penalty, the *actio commodati* must be directed against him (M.) alone, and not against the other (S.). The answer to this question is given in a quotation from Celsus which doubtless belongs to the same context as the quotation in β and γ. We have no difficulty in seeing Celsus's view to have been as follows:—At law, the fact of M. having sued the thief cannot prevent the commodator, T., from suing S. if he so chooses. If, however, T. does raise an action against S. and, when the proceedings are in *iure*, S. makes a request that T. sue M. instead—at the same time offering T. a promise of indemnity (with securities if necessary) in case he (T.) should fail to recover in full from M.—

¹ The inscription of fr. 6 has been the source of some trouble (see Levy, *Konk.*, p. 394), but with this point we are not concerned here.

² *Vide supra*, p. 229 ff.

in such an event, Celsus holds, the praetor must, in equity, take the request into consideration. That is to say, if T. refuses S.'s request and offer, and if in the praetor's opinion this refusal is unreasonable, he (the praetor) must deny T. an action against S.¹

Now this decision, eminently sound as it is, of course proceeds on the understanding that *litis-contestation* with M. frees S. If T., after suing M. and failing to exact from the latter the total amount due, has recourse against S. *quoad* the deficiency in another *actio commodati*, the promise of indemnity becomes altogether useless; the whole end of this promise is that T., though by joining issue with M. he loses all further right of action *commodati* against S., may still be able to sue S. (or his sureties) in an *actio ex stipulatu*. Hence, under the Justinianian law, extensive process-consumption being now abolished, the decision loses its entire point. The Compilers, however, sought to adapt the same to the new law by two manipulations:

(i) It seems fairly clear that they deleted some such word as "cavere" between "paratus sit" and "periculo." By means of this manipulation, which, so far as I am aware, has not previously been observed, the Compilers eliminated the necessity of any formal promise of indemnity; all S. had to do was to say to T., "sue M. at my risk."²

(ii) We may affirm with practical certainty that

¹ Alternatively, it would appear, the praetor might grant the action, but instruct the iudex to absolve S., if he (the iudex) found in fact that T. had acted unreasonably in the matter; as the *iudicium commodati* was *bonae fidei*, no formal *exceptio* would be required.

² *Κινδύνῳ ἑμῷ κίνησον κατὰ τοῦ ἐτέρου* (M.): sch. τοῦτο i.f. to Bas. XIII. I. 5.

εἰ δὲ ὁ μὴ κινήσας τὴν περὶ κλοπῆς . . . ἀγωγὴν (S.) . . . ἀξιοῖ κινδύνῳ αὐτοῦ κινήσαι τὸν χρήσαντα (T.) κατὰ τοῦ ἐτέρου (M.) . . . : Bas. eod. 7 (Heimb. II., p. 13).

the final words of period η "et absolvi" were added by the Compilers.¹ These words are quite inconsistent with the classical law; under the latter S. cannot obtain an absolutory judgment unless issue has first been joined between T. and himself; and, if issue has so been joined, M. is now freed by process-consumption, so that T. can no longer sue him. Without a doubt Celsus had regard solely to proceedings in iure and to the praetor's power of refusing actions.² The words "et absolvi" only become intelligible under a system where there was no distinction between ius and iudicium nor extensive process-consumption, and where the judge might quite naturally give effect to S.'s request by pronouncing an absolutory judgment in his favour. Such a judgment having been pronounced, T. is compelled to seek his remedy against M.; but, as the action against M. is at S.'s risk, T. must be granted regress against S., should he fail to recover the full amount from M., even though S. has already been formally absolved.

Thus the Compilers, with considerable ingenuity it must be admitted, succeeded in making Celsus's decision outwardly conformable to the new law. Still, no careful enquirer could fail to perceive that the decision, even as amended, was somewhat anomalous from the Justinianian standpoint, and actually it gave considerable trouble to the Byzantine commentator Stephanos.³

We now turn to § 1 of fr. 7. If period θ could be accepted as genuine, the question submitted by Ulpian would be as follows: One of the co-

¹ There is nothing corresponding to these words in Bas. XIII. 1. 7.

² Levy, *Konk.*, p. 216.

³ See Bas. XIII. 1. 5 sch. τοῦτο; eod. 7, sch. Στεφ.; Levy, l.c.

commodataries, M., has injured the article lent, so that the commodator, T., has an *actio legis Aquiliae* against him; but T. brings an *actio commodati* against the other co-commodatary, S., in respect of this injury. It is thus inferred that S. is liable for M.'s wrongful act, and that the *actio commodati* against him (S.) is well founded. The question is whether S., if condemned, can claim an assignment of T.'s *actio legis Aquiliae* against M., with a view to working out relief? The answer of the classical law to this question would, I think, be that S. can claim such assignment if he is entirely free from blame himself, but not otherwise.¹

From the Compilers' standpoint, however, there arises a difficulty which is implied in period ι : "if perchance the other party (M.) has caused an injury which the party sued (S.) can be compelled to make good in an *actio commodati*." That this period, which reproduces exactly the language and style of the Compilers, is interpolated, no one at the present day will dispute. It infers that ordinarily one correal debtor was not liable for the wrongful acts and neglects of another, but that here, in order to make θ intelligible, we must assume the existence of some exceptional circumstance,² which renders S. liable to be sued *actione commodati* in respect of M.'s wrongful act. If, then, we accept period θ as of classical origin, it and period ι afford us, as Levy points out,³ a most cogent argument in favour of the view that under the classical law correal debtors were extensively responsible for wrongful acts and neglects, and that under the Justinianian law this extensive responsibility

¹ Cp. *infra*, p. 301, n. 2.

² *E.g.*, S. has been guilty of negligence in allowing M. to commit the wrongful act; cp. *infra*, p. 302.

³ *Konk.*, p. 212, n. 5 (c) to p. 210.

had been done away with. But whether we can actually regard period θ as genuine in its present form is quite another matter which we shall consider presently.

The question raised in θ is not answered directly, but period κ suggests an affirmative answer: "for if it were against S. himself that T. had an *actio legis Aquiliae*, it is most equitable that in suing S. *commodati* he (T.) remit this *actio legis Aquiliae*." Substantially this decision is sound from the classical standpoint. There is no civil consumption relation between the delictal *actio legis Aquiliae* and the contractual *actio commodati*, but clearly it would be inequitable that T. should recover damages twice over.¹ The actual authenticity of period κ is, however, a very different question.

Period λ will be admitted by every one nowadays to be entirely the work of the Compilers. In a manner thoroughly characteristic of the latter and in flat contradiction to the view which has just been pronounced most equitable in κ , this period suggests and approves the doctrine that T., if he sues *commodati*, does not lose his *actio legis Aquiliae*; all that happens is that if he subsequently brings the latter action, the sum which he has already recovered must be taken into account.

Now we must approach the question as to the genuineness of periods θ and κ .

Period θ presents a number of anomalies. In the first place, we note the long separation of "*legis Aquiliae*" and "*actionem*." It certainly looks as if the writer had originally intended to use the genitive

¹ This matter will presumably be discussed at length by Levy in the yet unpublished second volume of his *Konkurrenz*; cp. meanwhile the discussion of the *actio legis Aquiliae* in his *Privatstrafe u. Schadensersatz*, p. 135 ff.

“*legis Aquiliae*” alone, but inserted “*actionem*” as an after-thought in view of the subsequent “*cedere*.” Classical jurists, however, do not indulge in such slovenly constructions. In the second place, we note the phrase “*adversus socium eius*,” which can only mean “against the *socius* of him who is sued in the *actio commodati*,” *i.e.*, against M. But the omission of “*qui actione commodati convenitur*,” or the like, after “*eius*” is quite unjustifiable, and the present use of “*socius*” in the sense of “fellow commodatary” is, at any rate, a little remarkable. In the third place, the perfect “*habuit*” is quite unintelligible as the period stands, the present “*habet*” being obviously required. Finally, we have difficulty in grasping at first sight the position contemplated in θ , whereas perfect perspicuity is the first watchword of every legal writer worthy of the name.

For these reasons I have little difficulty in holding that period θ cannot have been written by Ulpian in its present form. The key to the restoration seems to lie in the perfect “*habuit*.” Let us eliminate the reference to the *actio legis Aquiliae*, and assume that Ulpian was dealing solely with two actions *commodati* against the co-commodataries M. and S. respectively; let us further assume that the commodator T. has joined issue with S., and the question then is raised as to the right of the latter to a cession of T.’s *actio commodati* against M.; under these circumstances, the perfect “*habuit*” becomes perfectly intelligible. The *litiscontestatio* with S. has extinguished T.’s right of action against M., so that this latter action is now properly described as “*quam commodator habuit*.” In order that the cession in question may be effected, the action

against M. must first be revived by a praetorian grant of *restitutio in integrum* annulling the process-consumption.¹

Now what may have been the purport of period θ as written by Ulpian? I suggest the following: "*sed si culpa alterius (M.) res commodata deterior facta sit, et alter (S.) eo nomine condemnnetur, videndum erit ne alteri condemnato (S.) quam adversus alterum (M.) habuit commodator actionem, rescisso superiore iudicio, cedere debeat.*" That Ulpian did actually write something like this seems to me extraordinarily probable. S. can be condemned in respect of a wrongful act or neglect of M., and the question is whether in such case S. can claim an assignment of T.'s *actio commodati* against M. The answer to this question must, it is thought, be that S. is entitled to such assignment if, but only if, he himself is free from all blame in the matter²: "*et verius est debere, dummodo sine ulla condemnati ipsius (S.) culpa damnum datum sit.*"

Assuming then the substantial soundness of our restorations, let us consider in what light the case would appear to the Compilers. Extensive process-consumption being abolished, it would seem to them anomalous to condemn S. in respect of M.'s wrongful act or neglect and then grant him (S.) an assignment of T.'s *actio commodati* against M.; if S., on being sued *actione commodati* proves that the injury complained of is attributable to M. alone, he ought to be absolved, and T. left to bring a fresh *actio commodati* against M. Extensive process-consumption and extensive responsibility go hand in hand, and

¹ Cp. the acute observations of Levy, *Konk.*, p. 222 ff., with regard to *cessio actionum* in the case of co-tutors.

² The principle is the same as if the assignment of an *actio legis Aquiliae* against M. had been at stake; cp. *supra*, p. 298.

with the abrogation of the former, the latter loses its *raison d'être*.¹

But consider the following case from the Justinianian standpoint: M. has been guilty of a wrongful act rendering him liable in an *actio legis Aquiliae*, and S. has been guilty of negligence in permitting such an act to take place; if T. sues S. in an *actio commodati*, the latter by reason of his negligence cannot escape condemnation, but can he claim an assignment of T.'s *actio legis Aquiliae* against M., who is the party culpable in the first degree? This seems precisely the case which the Compilers have substituted in place of that figured by Ulpian, and which is discussed in § 1 as it stands. The same question might indeed have arisen under the classical law, though here it would apparently have caused little difficulty; as already indicated,² if S. has contributed in any way to the wrong he has no claim to an assignment. The Justinianian law, however, seems to have treated the question of *cessio actionum* as an open one, except where the party seeking the assignment had been guilty of actual *dolus*³; hence in the concrete case figured the point whether T.'s *actio legis Aquiliae* against M. should be assigned to S., might appear somewhat delicate.

If our views regarding period θ be accepted, it is impossible to hold period κ genuine, this latter period being obviously connected with the former. The Compilers, in characteristic fashion, do not answer the question raised in θ , but merely suggest a parallel case, the decision in which seemed to have some bearing on the said question. Moreover, the passage "*si adversus ipsum . . . commodator*" in this period

¹ *Vide supra*, p. 83.

² *Supra*, p. 298.

³ Cp. Levy, *Konk.*, p. 230 ff.

is clearly founded on the “*si legis Aquiliae . . . actionem*” passage in θ ; the same “*habuit*,” impossible in its present context, reappears here also; “*ipsum*” in the sense of “*eum ipsum qui actione commodati convenitur*” is obscure; “*aequissimum est ut*” is ungrammatical and ἀπαξ λεγόμενον¹; the clause, “*ut commodati agendo remittat actionem*” is vague and slovenly—does it mean that T. can only obtain a condemnation in his *actio commodati* if he promises (with sureties, if necessary) not to exercise his *actio legis Aquiliae*,² or that T., if he sues *commodati* is thereby deemed to have abandoned his *actio legis Aquiliae*, so that any subsequent request for the latter action must be refused, or what precisely does it mean?; the final “*actionem*” without anything definite to indicate that the *actio legis Aquiliae* is intended, is harsh.

We have therefore little hesitation in pronouncing the whole of § 1 after period θ interpolated.

§ 35. Authorities. (§ 33 (B). Sale and Hire.)

(1) D. (19. 2) 13. 9. Ulpian. XXXII. ad edict.

Duo rei locationis in solidum esse possunt.

This brief paragraph is one on which no reliance whatever can be placed. It is totally irrelevant both to its preceding and to its succeeding context, and, moreover, its significance is quite uncertain. Perhaps Ulpian in this place discussed at some length the question of a solidary relation between co-letters and co-hirers, and the bald statement quoted is all the Compilers have left of his argument.

¹ VIR. I., col. 296.

² Cp. Ulpian. D. (6. 1) 13 i. f.: unde quaeritur an non alias iudex aestimare damnum debeat, quam si remittatur actio legis Aquiliae. et Labeo putat cavere petito remittere lege Aquilia non acturum: quae sententia vera est.

(2) D. (19. 2) 47. Marcellus VI. digest.

α. Cum apparebit [emptorem conductoremve]
 $\langle \sim \rangle^1$ pluribus [vendentem vel locantem]
 $\langle \sim \rangle^2$ singulorum in solidum intuitum
 personam,

β. ita demum ad praestationem partis [*singuli
 sunt* compellendi] $\langle \sim \rangle^3$, si constabit
 [*esse omnes solvendo*] $\langle \sim \rangle^4$,

γ. quamquam [*fortasse iustius sit etiam, si*
 solvendo omnes erunt, [*electionem con-
 veniendi quem velit non auferendam actori,
 si*] $\langle \sim \rangle^5$ actiones suas adversus ceteros
 praestare non recuset.

D. (21. 1) 31. 7. Ulpian. I. ad edict. aed. cur.

δ. Marcellus quoque scribit, si servus communis
 servum emerit et sit in causa redhibitionis,
 unum ex dominis pro parte sua redhibere
 servum non posse: non magis, inquit, quam
 cum emptori plures heredes exstiterunt nec
 omnes ad redhibendum consentiunt.

D. eod. 31. 8.

ε. Idem Marcellus ait non posse alterum ex dominis
 consequi actione ex empto, ut sibi pro parte
 venditor [*tradat*] $\langle \sim \rangle^6$, si pro portione
 pretium dabit:

ζ. et hoc in emptoribus $\langle - \rangle^7$ servari
 oportere ait:

¹ emptoribus conductoribusve

² vendidisse vel locasse aliquem ³ est compellendus

⁴ illum qui solus ex empto conductore agit, in totum pretium
 satisfacere paratum esse

⁵ dummodo

⁶ mancipio servum det

⁷ pluribus, quorum singulorum in solidum venditor intuitus sit
 personam,

- η. nam venditor pignoris loco quod vendidit retinet, quoad emptor < - >¹ satisfaciat.

D. eod. 31. 10.

- θ. Si venditori plures heredes exstiterint, singulis pro portione hereditaria poterit servus redhiberi,
 ι. et [*si servus plurium venierit, idem erit dicendum* :
 κ. [*nam si unus a pluribus² vel plures ab uno³ vel plura mancīpia ab uno emantur,⁴ verius est dicere,*
 λ. [*si quasi plures rei fuerunt venditores, singulis in solidum redhibendum* :
 μ. [*si tamen partes emptae sint a singulis,*] recte dicetur alteri quidem posse redhiberi, cum altero autem agi quanto minoris.
 ν. [*item si plures singuli partes ab uno emant, tunc pro parte quisque eorum experietur* :
 ξ. *sed si in solidum emant, unusquisque in solidum redhibebit.*]

That the quotations in D. (21. 1) 31. 7, 8 come, like D. (19. 2) 47, from the sixth book of Marcellus's *Digest*, may be regarded as practically certain.⁵ Let us see whether by the aid of a comparative study we can do something to explicate the last-mentioned fragment, which at first sight seems almost hopeless.

We shall consider D. (21. 1) 31. 7, 8 (periods δ-η)

¹ *qui partis petat praestationem, in totum pretium*

² sc. *emat*

³ sc. *emant*

⁴ "*vel plura . . . emantur*," irrelevant.

⁵ See Lenel, *Pal. I.*, col. 600.

first. Period δ only concerns us in so far as it gives the context of the following periods. In period ϵ we must, without doubt, substitute “*mancipio servum det*” for “*tradat*.” The object of the sale is shown by δ to be a slave (*i.e.* a *res Mancipi*), and, moreover, “*tradat*” without a direct object is harsh; we may assume “*servum*” to have been omitted through inadvertence in the process of interpolation.¹

Period ζ is hardly possible in its present form, and Krüger proposes to read “*in emptoris heredibus*” for “*in emptoribus*,” which emendation agrees very well with Labeo-Javolen. D. (18. 1) 78. 2. But on the other hand the Basilika² have ἐπὶ πολλῶν ἀγοραστῶν, and “*emptoribus*” should therefore, I think, be retained. My conjecture is that period ζ originally summarised Marcellus’s decision in the passage now figuring as D. (19. 2) 47 (periods α - γ), so far as the same related to sale, and that the Compilers have deleted after “*emptoribus*” some such words as “*pluribus, quorum singulorum in solidum venditor intuitus sit personam*.” I also suspect that some such words as “*qui partis petat praestationem, in totum pretium*” have been deleted between “*emptor*” and “*satisfaciat*” in period η , which period seems originally to have served as a motive and explanation of ζ as restored.

We now turn to D. (19. 2) 47. In period α the passage “*emptorem . . . locantem*” is obviously impossible, and various attempts to correct it by way of emendation have been made.³ For my own part, I favour the suggestion that Marcellus wrote “*cum apparebit emptoribus conductoribusve pluribus*

¹ With D. (21. 1) 31. 8 compare Paul. eod. 57 pr.

² XIX. 10. 27 (Heimb. II., p. 308).

³ Thus, Mommsen proposes to change “*emptorem conductoremve*” to “*emptoribus venditoribusve*,” and Lenel (*Pal.*, I., col. 600, n. 4) to change the same words to “*emptorum conductorumve*.”

vendidisse vel locasse aliquem singulorum in solidum intuitum personam," or the like. According to this conjecture a sale (hire) to several purchasers (hirers) jointly was under consideration, and Marcellus was thinking of the contrast between the two cases (*a*) where each of the co-purchasers (co-hirers) was liable to pay a proportionate share only of the price (rent), and (*b*) (the case actually dealt with here) where each of the co-purchasers (co-hirers) was liable to pay the full price (rent).¹

As period β now stands, a *beneficium divisionis*² is obviously referred to, but the manner in which this reference is expressed is impossible. In the first place we note that "partis" should, strictly speaking, be "partium" in order to agree with the following "singuli sunt compellendi"; this point must not, however, be pressed, for the classical jurists were not over particular in their use of the singular and plural in such connections.³ In the second place, the fact that two or more parties are granted a *beneficium divisionis* is not correctly stated by saying that "each is to be compelled to render a

¹ It is a serious question whether we should not eliminate entirely the reference to *locatio-conductio* in D. (19. 2) 47. The fact of this fragment occurring in the title *Locati conducti* does not in itself preclude such a course; with the Compilers all things are possible, and they may quite well have introduced the said reference merely in order to give the fragment a place in this title. As at present advised, however, I am prepared to let the mention of *locatio-conductio* stand. This contract, where its prestation-object was a "res," was akin to *emptio-venditio* and governed by similar rules (see Gaius D. (19. 2) 2; *Gai.* III. 142 ff.; *Inst.* III. 24). Hence we may assume that the two contracts followed as far as possible the same lines with respect to solidarity.

² Apparently either between co-vendors (co-letters) as regards their liability to make over the thing sold (hired) or between co-purchasers (co-hirers) as regards their liability to pay the price (rent); *vide infra*, p. 315.

³ Cp., e.g., Papinian. D. (45. 2) 11. 1: "virilem partem singuli stipulati videbantur" (*supra*, p. 37).

part of the prestation." Such a mode of expression obliterates the idea of a "benefit"; what we should say is that "*no one* is to be compelled to render *more than* a part of the prestation."¹ But further, the grant of a beneficium divisionis to co-principal debtors belongs to the Justinianian, not to the classical, law.² What then may Marcellus have here written? Following up the conjecture that period ζ summarises the present decision and that period η explains it, I venture to restore β thus: "*ita demum ad praestationem partis est compellendus (sc. venditor vel locator), si constabit illum qui solus ex cmpto conductove agat, in totum pretium³ satisfacere paratum esse,*" or the like.

In period γ the Compilers, in thoroughly characteristic fashion, proceed to question the soundness of their preceding decision, by suggesting it as more equitable that a beneficium divisionis should not be granted, but that the creditor should be allowed to sue any one debtor for the whole, provided he is willing to assign to such debtor his rights of action against the others. No argument is required that this passage could not have been written in its present form by Marcellus,⁴ and the only question is, What did the latter write? I venture to think that his original text may have contained the words "quam-

¹ It is not grammatically possible to give β this meaning by taking "demum" with "partis" ("of a part only").

² *Vide supra*, pp. 34 f., 240. Collinet, *Études Historiques sur le Droit de Justinien*, I., p. 141, n. 3, also holds the present reference to the beneficium divisionis interpolated, though his restoration of the fragment as a whole is, in my opinion, quite impossible.

³ "Pretium" may denote "rent" (= merces) as well as "price."

⁴ As to "fortasse" see Beseler, III., p. 83 ff.; with "iustius sit," Levy, *Konk.*, p. 218, n. 1, compares the concluding words of Justinian. C. (7. 72) 10 pr., "quid enim iustius est . . ."; "quamquam" properly takes the indicative, though the jurists do indeed sometimes use it with the subjunctive—see Kalb, *Wegweiser*, p. 112.

quam solvendo omnes erunt," which words gave the Compilers the cue to introduce the beneficium divisionis. Marcellus's meaning then is: Although all the purchasers (hirers) are solvent, so that the vendor (letter) has no reason to fear a failure to recover from each his proportionate share of the price (rent), yet, as they are liable singuli in solidum, any one must pay the full price (rent) if he wishes to claim his proportionate share of the object sold (hired). Furthermore, I venture to think that Marcellus may have added "*dummodo* (*sc. venditor vel locator*) actiones suas adversus ceteros praestare non recuset." As any one purchaser (hirer) by paying the whole price (rent) entitles the others to claim their proportionate shares of the object without further payment, he is reasonably entitled to a cessio actionum.

Assuming the substantial soundness of the foregoing restorations, we now proceed to examine closely the case of a sale to two persons jointly.¹ The seller we shall call S. and the purchasers P₁ and P₂; the prestation-object we shall imagine to be a slave.

As regards the obligatio empti (*i.e.* the relation between the purchasers as creditors and the seller as debtor), P₁ and P₂ are ipso iure entitled merely pro rata, for, as we have previously had occasion to remark,² an active joint contract naturally leads to partition, not solidarity. As a pro rata creditor either of them, say P₁, can claim mancipation of a pro indiviso share only of the slave. But if P₁ makes this claim, is it sufficient for him to tender

¹ We shall not complicate our exposition by references to the case of hire.

² *Vide supra*, pp. 31 f., 241 f.

a corresponding part of the price or must he tender the whole?

The answer to this question depends on whether the obligatio venditi (*i.e.*, the relation between the vendor as creditor and the purchasers as debtors) is partitioned or solidary. If each purchaser is bound merely to pay a proportionate part of the price, then clearly P_1 on tendering his part is entitled to mancipation of a corresponding share in the slave. Here the passive joint obligatio venditi is partitioned as well as the active joint obligatio empti; in other words the joint contract may be analysed into two separate contracts, in each of which the thing sold is a separate pro indiviso share in the slave and the price is a separate part of the total value. But, on the other hand, if the purchasers are bound *singuli in solidum* for the price, then, though P_1 can as before claim only a pro indiviso share in the slave, he must as a condition of so doing tender the price in full. A little reflection will show how eminently sound this result is. S. is entitled to sue P_1 for the full price, but in so doing he need only tender a pro indiviso share in the slave; conversely, P_1 is entitled to sue S. for a pro indiviso share in the slave and that alone, but in so doing he must tender the full price. Here we have partition on the active side concurring with solidarity on the passive side, and the result can only be as stated.

With regard to the obligatio venditi, we now ask, When is the liability of the co-purchasers to pay the price solidary and when is it partitioned? In our opinion, if the terms of the sale contain no express provision on this point, the decision must be in favour of solidarity. A passive joint contract leads naturally

to solidarity, and any doubt on the matter would seem to be settled by the words "singulorum in solidum intuitum personam" in *a*. These words, which correspond exactly to Papinian's "utriusque fidem in solidum secutus" in D. (45. 2) 9 pr.,¹ indicate that the implicit intention of S. (the creditor in the obligatio venditi) is the determinating factor in the situation, and of course his intention will always be to hold the co-purchasers liable solidarily if he can.² Accordingly, the co-purchasers, if they wish to be held liable merely pro rata, must make a special pact with the vendor to this effect.

Again, with regard to the obligatio empti, we ask, Can P_1 and P_2 be constituted solidary creditors so that either can claim a transfer of the entire property in the slave? There seems no reason why such active solidarity should not be created by special pact, but we can hardly regard this case as of frequent occurrence; if P_1 and P_2 wished to acquire solidary rights, they doubtless would as a rule stipulate correally from S., the obligatio empti being thus novated.

Now let us consider the converse case where two parties, S_1 and S_2 , jointly sell a slave to a single party, P. Here S_1 and S_2 are only entitled pro rata in the obligatio venditi, unless by special pact active solidarity is created. Such a pact cannot, however, have been frequent, a correal stipulation with novatory effect being no doubt preferred in practice. The case of the obligatio empti is more difficult. Though the contract is here passively joint, can P. claim from either of the vendors more than his (the particular vendor's) share in the slave, unless solidarity be expressly provided for by pact? Probably not, we think; here the common property relation of the

¹ *Vide supra*, p. 265 ff.

² *Vide supra*, pp. 242, 268 f.

vendors seems to counteract the natural tendency of the passive joint contract to produce solidarity, for obviously a co-owner cannot "primarily" dispose of more than his own share in the property. Moreover even if passive solidarity is intended, that is to say, if each co-owner is to assume "secondary" liability for the transfer of the other's share as well as of his own, the natural course will be to employ a correal stipulation. The sounder view, therefore, seems to be that a sale by two parties jointly produces per se partition on the passive as well as on the active side.

We thus attain the result that the passive joint obligatio venditi in a sale by one party to several was the only instance where a joint contract of sale per se produced a solidary relation. In other cases solidarity, active or passive, might be induced by pact, but here a correal stipulation would be preferred. The special question dealt with by Marcellus in D. (19. 2) 47—and the same question appears under another form in D. (21. 1) 31. 8 (period ϵ)—arises out of the interdependence, in the said case of a sale by one party to several, of the passive solidary obligatio venditi (liability of the co-purchasers to pay the price) and the active partitioned obligatio empti (right of the co-purchasers to claim the slave) which corresponds thereto.

The question whether the solidarity arising, either ipso iure or by aid of special pacts, from a joint sale, is or is not of a correal nature presents no difficulty. Assuming that no "inequality" or "non-identification" is introduced, the joint contract is fully effective to produce the constructive unity of obligation implied in correality. If, on the other hand, any "inequality" or "non-identification" is introduced, only simple solidarity can result.

We must now consider the problem regarding the Compilers' manipulations of D. (19. 2) 47. Considerable light is thrown on this problem by the interpolations in D. (21. 1) 31. 10 (periods $\theta - \xi$). I do not propose to subject this paragraph to any detailed critical examination which would lead us too far afield into the realm of the aedilician remedies. I merely submit—and I do so with some confidence—that the passages “si servus (ι) . . . a singulis (μ)” and “item (ν) . . . redhibebit (ξ)” are entirely due to the Compilers. Assuming then the soundness of this submission, let us examine the scheme of the paragraph. All that Ulpian says is that, if a single vendor dies leaving co-heirs, a separate actio redhibitoria may be brought against each in proportion to his share in the inheritance (θ), and that an actio redhibitoria may be brought against one co-heir and an actio quanto minoris against another (μ). The Compilers, on the other hand, take the opportunity of introducing the matter of a joint sale (ι and κ): (i) Where the plurality of parties is on the vendor side (si unus a pluribus (*sc. emat*)), and (ii) where it is on the purchaser side (vel plures ab uno (*sc. emant*)). They then attempt to work out the various results in each of the foregoing cases according as the joint sale is (*a*) solidary (λ and ξ) or (*b*) partitioned (μ and ν). Be the practical value of this attempt great or small, yet the fact of its having been made is highly significant; for we here see that the Compilers, and perhaps certain oriental law professors before them, had been applying their minds to the question of joint bilateral contracts and had been seeking to schematise the various situations which might occur.¹

¹ Cp. also D. (17. 2) 31 i.f., a fragment which has been much interpolated; Berger, *Teilungsklagen*, pp. 27 f., 133, n. 1.

Now for our present purposes the important point is that, so far as we can judge, the Compilers disregarded the possibility of a joint contract of sale (or a joint bilateral contract in general) producing solidarity on the one side and partition on the other. In λ the co-vendors are "quasi plures rei," which apparently means both that they are entitled *singuli in solidum* to claim the price and that they are bound *singuli in solidum* to deliver the thing sold. In μ "proportionate parts of the thing have been bought from the co-vendors respectively," which apparently means both that each vendor is entitled to claim merely a proportionate part of the price and that each is bound to deliver merely a proportionate share of the thing sold. Likewise, apparently in ν , the co-purchasers are both entitled and bound *pro parte*, and in ξ they are both entitled and bound *in solidum*. No reference at all is made to the case where a thing is sold by one party to several, under circumstances which render the co-purchasers liable *singuli in solidum* to pay the price, though each is entitled to claim merely a share of the thing sold. From this omission, we are led to infer that the Justinianian lawyers had drawn up a scheme of possible cases, that each of these cases was symmetrical in the sense that the active and the passive relations harmonised as regards solidarity *v.* partition, and that no room was left for the unsymmetrical case where passive solidarity concurred with active partition.

If these observations be justified, the interpolations in D. (19. 2) 47 cease to present any serious difficulty. Marcellus, we believe, was dealing with the case where several co-purchasers (co-hirers) were entitled merely *pro rata*, but were bound *singuli in solidum*,

and the Compilers felt themselves bound to recast the fragment as this case did not fit in with their scheme. Now we come to their extraordinary *modus operandi*. What do the words “*emptorem conductoremve pluribus vendentem vel locantem*” in *a* signify? In my opinion, what the Compilers meant to say can only have been “*emptorem conductoremve a pluribus vel pluribus vendentem vel locantem*,” “a purchaser (hirer) from several or a vendor (letter) to several,” but the words “*a pluribus vel*” were inadvertently omitted, perhaps through the stupidity of some scribe who failed to understand the Compilers’ instructions. The meaning of period *a* as it stands, now becomes plain. The words “*singulorum in solidum intuitum personam*” indicate the constitution of a solidary relation, both active and passive, so that two cases are here considered: (i) that of a “*emptor (conductor) a pluribus*,” where the co-vendors (co-letters) are solidarily related both actively and passively—this is the same case as is figured in period λ , and (ii) that of a “*vendens (locans) pluribus*,” where the co-purchasers (co-hirers) are solidarily related, both actively and passively—this is the same case as is figured in period ξ .

Having now given period *a* an entirely fresh significance, the Compilers proceed in β to admit a *beneficium divisionis* in favour of the co-vendors (co-letters) or co-purchasers (co-hirers) *quâ* debtors, and then in γ they question the propriety of this admission and evince an inclination to grant a “*beneficium cedendarum actionum*” merely. All this is highly important for the study of these two *beneficia* under the Justinian law, but does not further concern us here.

Let us now return to D. (21. 1) 31. 8. If my conjecture be sound, that after “*emptoribus*” in ξ

Ulpian wrote "*pluribus quorum singulorum in solidum venditor intuitus sit personam*," so that we have here a partial summary of Marcellus's decision in D. (19. 2) 47 (as restored), all serious difficulty is removed. In the preceding period ϵ , which deals not with a joint sale to two parties, but with a simplex sale to a slave owned in common, Marcellus, as quoted by Ulpian, holds that neither of the co-owners of the purchaser-slave can claim *pro parte* mancipation merely by tendering a part of the price. This decision the Compilers left untouched, except for the alteration of mancipation to tradition. The sale is here simplex, not joint, in form, and no question is raised as to whether the liability of the co-owners (*quod iussu*, etc.) for the price is solidary or *pro rata*. Superficially, therefore, this case may be treated as equivalent to that where the purchaser is a single freeman.¹

In period ζ , on the other hand, Ulpian, still quoting from Marcellus, turns to the case of a joint sale to several purchasers. Here the vendor's right to demand the full price in return for a *pro rata* mancipation is subject to the condition that the purchasers are liable for the price *singuli in solidum*; that is to say, the vendor must have made in the sale "*singulorum in solidum intuitus personam*"—the contract must not contain any term which renders the purchasers liable merely *pro rata*. When, however, this condition is fulfilled, we have the case of active partition concurring with passive solidarity, for which case there was no room in the Compilers' scheme. Under these circumstances the step which the latter took is illustrative of their methods in general. In periods ζ and η they simply deleted all reference to the solidarity of the co-purchasers'

¹ Cp. Ulpian. D. (19. 1) 13. 8.

liability and to the concurrence of such solidarity with the partition of their (the co-purchasers') right. Thus period ζ was reduced to a state of complete vagueness, and period η deprived of its special point as a motive and explanation of the original ζ.

§ 36. Mandate.

For purposes of exposition we must consider separately the cases of A, a plurality of mandataries, and B, a plurality of mandators.

A. PLURALITY OF MANDATARIES.

1. **Obligatio directa.**¹ — If a single mandate is imparted by the mandator T. to two mandataries, M. and S. jointly, then, as a passive joint contract leads naturally to solidarity, not partition, M. and S. will be liable *singuli in solidum*, unless *pro rata* liability is expressly provided for. The solidarity will be *correal* if there is no "inequality" or "non-identification" between the two obligations, otherwise it will be simple. The jointness of a mandate depends on the material fact of M. and S., having each undertaken to act in conjunction with the other; there must be *communis consensus* on the part of the mandataries. Suppose, for example, that a mandate is given by T. to M. alone, and subsequently it is desired to associate S. with M.; in order that M. and S. may be joint mandataries, each must agree to act with the other, so that the original simplex contract of T. with M. is in effect superseded by a fresh joint contract with M. and S.

Under certain circumstances, however, it is quite

¹ As to the use of the expressions *obligatio (actio) directa* and *contraria* in connection with mandate, *vide supra*, p. 243.

possible for independent mandates having one and the same juristic end to be given to different parties. For example, T. may give M. and S. each a separate mandate to purchase for him the same fundus Cornelianus. What relation is here created between M. and S.? The lack of communis consensus between M. and S.—in other words, the absence of unity of originating cause—plainly excludes the idea of correality. But it is equally plain that if either M. or S. effects the purchase, T. can have no further claim against the other. The question then arises, Have we here a real case of simple solidarity? Suppose neither M. nor S. fulfils the mandate, then, if one of the mandataries pays the mandator's full interesse, is the other ipso iure freed? If so, the relation is one of legal solidarity; if not, then it is one of legal cumulation, and the aid of equity must be invoked in order to prevent the mandator from exacting double damages.

In my opinion, the decision must be in favour of legal cumulation; even in the case of the formless negotia the reaction of the civil law against solidarity without unity of originating cause must exert a decisive influence.¹ The fact that specific fulfilment by the one mandatary frees the other may easily be accounted for on the ground that the two mandates by their nature cannot both be fulfilled; it is only in the event of non-fulfilment of both mandates that the legal cumulation can operate.

If this view be sound, the present case shows the above-mentioned reaction of the civil law at its highest. Here we have two co-ordinate obligations, specific fulfilment of one of which must nullify the other, and the idea that, in the event of non-

¹ *Vide supra*, p. 157.

fulfilment of both, the creditor can exact double damages, is therefore opposed to common sense; yet this is the result to which the application of civil law principles necessarily leads.¹

The position may be summed up by saying that only in equity is the identity of juristic end recognised; the law itself refuses to take this identity into account, where unity of originating cause is lacking. It is, however, to be observed that the resort to equity in order to prevent the mandator from exacting double damages does not imply any necessity of the praetor's intervention, for the iudex in a bonae fidei iudicium can give effect to equitable defences without the aid of an exception.²

The question as between legal and merely equitable solidarity becomes practical when we consider the matter of *cessio actionum*. If M. and S. be legal solidary debtors, then *solutio* by one, say M., liberates the other, S., absolutely. Accordingly, after M. has made *solutio*, no assignment to him of T.'s right of action against S. is possible, for ex hypothesi such right no longer exists. But furthermore, if T. first assigns to M. his said right of action against S., and M. then makes *solutio*, this *solutio* must, according to principle, liberate S. equally as before; the fact of T.'s said right of action having already been assigned (whether to M. or to a third party) cannot at strict law prejudice the operation of *solutio-consumption*. In such cases, however, the classical jurisprudence contrived to exclude *solutio-consumption* by aid of the fiction of a sale of actions. If, before any *solutio* is actually made,

¹ Compare with this case our exegesis of D. (45. 1) 9, *supra*, p. 202 ff.

² Cp. *supra*, pp. 194, 246, n. 1.

T. assigns to M. his right of action against S. (*i.e.*, agrees to appoint M. his *cognitor* (*procurator*) in *suam rem* for the purpose of suing S.) as a consideration for solutio, this transaction is fictitiously regarded as a sale of T.'s said right of action; consequently the solutio by M. following hereon is represented as payment of the price of this right of action, and not as fulfilment of his (M.'s) original obligation. Hence, solutio consumption will not operate.

All this is explained in a passage which, though it refers immediately to the correal relation of co-tutors, is equally relevant here, for extensive solutio-consumption operates alike both in correalty and in simple solidarity :

D. (46. 3) 76.¹ Modestinus respondit, si post solutum sine ullo pacto omne quod ex causa tutelae debeatur, actiones post aliquod intervallum cessae sint, nihil ea cessione actum, cum nulla actio superfuerit: quod si [*ante solutionem hoc factum est vel*], cum convenisset ut mandarentur actiones, tunc solutio facta esset, [*mandatum subsecutum est,*] salvas esse mandatas actiones, cum [*novissimo quoque*] <*hoc*> casu pretium magis mandatarum actionum solutum [*quam actio quae fuit perempta*] videatur.

On the other hand, if the solidarity is merely equitable, the legal result being cumulation, solutio

¹ This fragment has apparently been "touched up" by the Compilers, or some previous annotator, who failed, naturally enough, to understand the precise significance of *mandare* (*cedere*) *actionem* under the formulary system. The following passages should also be referred to in connection with this fiction of a sale: D. (15. 1) 30. 3; (27. 3) 21; (46. 1) 17; eod. 36; (50. 15) 5 pr. See Levy, *Konk.*, p. 223; *Sponsio*, p. 180 ff.; Haymann, ZSS. 40, p. 309 f.

by M. does not liberate S. at law ; hence a cession of T.'s right of action against S. still remains fully competent, and M. can claim the same for the purpose of working out proportionate regress against S., no fiction of a sale of actions being required. T. indeed, after he has recovered in full form, or probably after he has merely joined issue with,¹ M., will be precluded in equity from himself making a further claim against S., but S. has no equitable defence against M. suing as T.'s assignee.²

2. **Obligatio contraria.**—The right of M. and S. to recover all loss and expenses incurred through the execution of the mandate causes no difficulty. Whether a single mandate is imparted to M. and S. jointly, or distinct mandates be imparted to them severally, each can only claim payment of the loss and expenses which he himself has incurred, unless in the case of a joint mandate active solidarity be expressly created by pact. In the latter event, however, a correal stipulation, novating by anticipation the obligatio mandati contraria, would more naturally be resorted to.

B. PLURALITY OF MANDATORS.

1. **Obligatio directa.**—Two parties M. and S. may give a single joint mandate to T., or they may give separate mandates directed to one and the same juristic end. But in both cases alike, the claim of either M. or S. against T. can only cover his (the particular mandator's) interesse, unless, in the case of a joint mandate, solidarity be expressly created by pact. In the latter event, however, the

¹ *Vide supra*, p. 192 f.

² *Cp. supra*, pp. 184, n. 4 ; 191, n. 6.

parties would more naturally have resort to a correal stipulation.

2. **Obligatio contraria.**—If a single joint mandate be given by M. and S. to T., then, as a passive joint contract naturally leads to solidarity, not partition, M. and S. will be liable *singuli in solidum* to reimburse T. for all loss and expenses incurred through execution of the mandate, unless *pro rata* liability be expressly provided for. As usual, the solidarity will be correal where there is no “inequality” or “non-identification” between the two obligations, otherwise it will be simple.

Where separate mandates directed to one and the same juristic end are given by M. and S. to T., the question again arises whether the relation of M. and S. is one of simple solidarity, or is one of legal cumulation which only by the aid of equity becomes solidary. As in the case of a plurality of mandataries, I take the latter view. T., after having obtained his full *interesse* from, say, M., is still legally entitled to sue S., but if he does so, S. can invoke the *bonae fidei officium* of the *iudex* in order to gain absolution; and the same result will, I believe, normally take place where T. has merely joined issue with M. On the other hand, M., on making payment or even after payment has been made, is entitled to an assignment of T.’s right of action against S. for the purpose of working out proportionate relief, no fiction of a sale of actions being here required.

As is well known, mandate was extensively employed in later classical times for purposes of suretyship, and this aspect of the contract will be discussed fully in our future study on Accessoriality. At present we have merely to note that co-mandators

enjoyed a *beneficium divisionis* under Hadrian's rescript if, but in the classical law only if, they were materially co-sureties for another.¹

Justinian, in his constitution C. (8. 40 (41)) 28 pr. of 531, expressly mentions the abolition of extensive process-consumption as between co-mandators, though whether a separate enactment to this effect had been made prior to 531 remains uncertain.² Naturally the abolition of extensive process-consumption must be applied to all cases of passive correality *ex mandato*.

Finally, the Compilers seem to have obliterated the classical principle that legal solidarity between two *obligationes mandati* was impossible without unity of originating cause, that is to say, without *communis consensus* between the different mandataries or mandators.³ What they have done, here as elsewhere, is to raise to a legal status the merely equitable solidarity which, under the classical law, existed between obligations arising separately but directed to the same juristic end. Accordingly, here as elsewhere, we have a Justinianian several solidarity, where unity of originating cause is lacking, as opposed to Justinianian joint solidarity, where such unity is present, though both these institutes alike possess the same *solutio-consumption* basis.⁴

¹ Hadrian's rescript, I believe, applied directly to *fideiussors* alone (*contra*, Justinian. C. (4. 18) 3), but jurisprudence extended its provisions to other parties who, though formally principal debtors, were materially in the position of sureties. See *Gai.* III. 121 ff.; *Papinian.* D. (27. 7) 7; *Levy, Sponsio*, p. 146; *supra*, p. 34, n. 1.

² *Vide infra*, p. 329 f.

³ See D. (46. 1) 52. 3; *infra*, p. 332 ff.

⁴ Cp. *supra*, p. 253 f.

§ 37. Authorities (§ 36).

(1) D. (17. 1) 60. 2. Scaevola I. respons.

Duobus quis mandavit negotiorum administrationem: quaesitum est an unusquisque mandati iudicio in solidum teneatur. respondendi unumquemque pro solido conveniri [*debere, dummodo ab utroque non amplius debito exigatur*].

As the facts are here stated, we cannot but assume that a joint mandate is referred to, the case where the administration of the same negotia is entrusted to two parties severally being hardly possible. Moreover, the question raised deals with the antithesis solidarity *v.* partition, and this antithesis only presents itself where we have unity of originating cause.¹ The decision, as it stands, is to the effect that each mandatary should (must? ought to?) be sued for the whole, provided not more than the amount due is exactly from both together. Here it is plainly inferred that litiscontestatio with the one does not free the other; yet under the classical law the two obligations, arising as they *ex hypothesi* do from a single cause, must be correally related, assuming of course that no "inequality" or "non-identification" has been introduced.

The final clause "*dummodo . . . exigatur*" is however very suspicious, and we have little hesitation in attributing it to the Compilers.² Again, the preceding "*debere*" cannot have been written by Scaevola,³ at any rate in its present position. As it

¹ *Vide supra*, p. 154, n. 2.

² Cp. Levy, *Konk.*, p. 203; "from both together" is not happily expressed by "*ab utroque*" (= "from each"), "*amplius debito exigere*" has a thoroughly Tribonianian ring.

³ Levy, *l.c.*

stands, if it means "must," it is false, for there was no reason why the mandator should not, if he chose, divide his action¹; if it means "ought to," then we observe that in the preceding question Scaevola is asked to state the legal right of the mandator, not to advise him on his most profitable line of action.

The paragraph, thus purged from interpolations, simply states that the co-mandataries are liable *singuli in solidum*, and not merely *pro rata*. But it is hardly possible that we have here the full purport of Scaevola's original response. The infinitive "*conveniri*" without an auxiliary verb is somewhat harsh; nor is it a legitimate mode of restoration to add "*posse*," for if the Compilers had found this word in the text, they would almost certainly have left it unaltered. Moreover, if Scaevola had merely meant to give an affirmative answer to the question "*an unusquisque mandati iudicio in solidum teneatur*," he need only have said "*teneri*." Hence we seem justified in concluding that only a fragment of Scaevola's response has been preserved by the Compilers. Probably the case he dealt with was considerably more complicated than that now presented.²

¹ Apparently the division would be carried out thus: Suppose the mandator T. wishes to sue mandatary M. for one-third, and mandatary S. for two-thirds, of the total amount due. In the formula of the first action brought, say against M., a *praescriptio* would be inserted running somewhat as follows: *ea res agatur de tertia parte eius quod Titii interest praestanda*. By this means the *intentio* and *condemnatio* of the action are artificially restricted to one-third of T.'s *interesse*, and a subsequent action against S. for the remaining two-thirds remains competent. Or a special formula in *factum*, restricted as aforesaid, might be granted against M. Cp. Levy, *Konk.*, p. 117, n. 2, and *supra*, p. 114 ff.

² A formal comparison with Paul. D. (42. 1) 43 (*supra*, p. 142) is perhaps not altogether without value. Gradenwitz, *ZSS.*, 7, p. 65 f., has on good grounds pronounced the remainder of this fragment after "*conveniri*" to be interpolated, so that here, as in our present fragment, we have an abrupt "*conveniri*" followed by an interpolation.

(2) D. (11. 6) 3 pr. Ulpian. XXIV. ad edict.

Si duobus mandavero et ambo dolose fecerint,
adversus singulos in solidum agi poterit, sed
altero convento [*si satisfecerit,*] in alterum
actionem denegari oportebit.

In this pr. "mandavero" is used in an untechnical sense, and refers not to the essentially gratuitous contract of mandate but to the employment of a mensor agrorum who naturally would be paid for his services.¹ The case here dealt with is very instructive, though strictly speaking it falls without the scope of this treatise.

If a mensor made a false return (*si mensor falsum modum dixerit*), he was liable in a praetorian action in factum which was delictal (*dolose fecerint*) and penal in its nature, though the amount of the condemnation was probably fixed at the plaintiff's *interesse*.² Hence where two mentores were employed jointly, they would on a strict application of civil law principles be liable cumulatively, each in the plaintiff's full *interesse*, the end of each obligation and action being theoretically the punishment of an individual wrongdoer.

It was, however, impossible for the classical jurisprudence to accept the foregoing result. Though penal in its nature, this action in factum fulfilled essentially a reipersecutory function, being to all intents and purposes designed to afford the plaintiff compensation for loss sustained through the mensor's misconduct. Hence Ulpian considers it the duty of the praetor, after *litiscontestatio* has taken place with one of two co-mentores, to refuse a further action against the other. Thus we have a case of equitable consumption corresponding to the civil consumption

¹ Levy, *Privatstrafe u. Schadensersatz*, p. 55, n. 5.

² Cp. Lenel, *Edict.*, p. 212.

which would have operated, had the parties been liable singuli in solidum in an actio mandati and issue had been joined with one of them.

That the words "si satisfecerit" are due to the Compilers, may now be accepted as beyond the possibility of doubt.

(3) D. (15. 4) 5. 1. Paul. IV. ad Plaut.

a. Si unus ex servi dominis iussit contrahi cum eo, is solus tenebitur :

β. sed si duo iusserunt, cum quovis in solidum agi potest, quia similes sunt duobus mandantibus.

The only question decided in period *β* is that, if both masters have authorised a negotium into which the slave enters with a third party, each is liable in solidum, and not merely pro rata, to the latter in an action quod iussu ; this decision is justified by a reference to a corresponding rule in the case of two mandators. The determination of the concurrence between the two actions quod iussu is not mentioned, but beyond doubt it was in the sense of process-consumption.

It is, however, worth while observing that, in this matter of the determination of the concurrence, a distinction must be drawn between duo domini iubentes and duo mandantes. In the case of the former, as the originating cause of obligation and action is the slave's negotium with the third party, we have unity of cause, and therefore civil consumption, even though the two iussa have been given independently¹ ; in the case of the latter, on the other hand, we cannot have unity of cause and civil consumption unless a single joint mandate be imparted.

¹ Levy, *Konk.*, p. 272, n. 4.

(4) D. (17. 1) 59. 3. Paul. IV. respons.

a. Paulus respondit unum ex mandatoribus in solidum eligi posse, etiamsi non sit concessum in mandato :

β. post condemnationem autem in duorum personam collatam, necessario ex causa iudicati singulos pro parte dimidia conveniri posse et debere.

It may perhaps be inferred from *a* that a party who accepted a joint mandate from two other parties ordinarily required an express undertaking of solidary liability; but, in any event, the same period states with perfect distinctness that such an express undertaking was quite superfluous.¹ The really vital point of Paul's response is probably that contained in period β, but with the question here raised we have already dealt.²

(5) C. (8. 40 (41)) 23. Diocletian. a. 294.

Reos principales vel mandatores [*simpliciter acceptos*] eligere vel pro parte convenire [*vel, satis non faciente contra quem egeras primo, post ad alium reverti, cum nullus de his electione liberetur,*] licet.

C. eod. 28 pr. Justinian. a. 531.

Generaliter sancimus, quemadmodum in mandatoribus statutum est, ut contestatione contra unum ex his facta alter non liberetur, ita et in fideiussoribus observari.

The words quoted from Justinian's constitution are capable only of one interpretation, namely, that

¹ It is apparently to be assumed that the co-mandators are not here in the position of co-sureties, otherwise they would have a beneficium divisionis; *vide supra*, p. 322 f.

² *Supra*, p. 141 ff.

process-consumption originally did operate extensively as between mandators,¹ but latterly this had been altered by statute, and the new rule is now made to apply as between fideiussors also. We must, however, observe that, under the classical law, while on the one hand fideiussors for the same principal debt stood in a process-consumption relation (accessory correalty), whether they were taken bound together or separately, on the other hand mandators for the same principal debt only stood in such a relation where a single joint mandate had been imparted. This distinction is based on the fact that a fideiussory obligation is formally accessory to the principal obligation, while a mandatory obligation is not, the accessory being here material only.²

The question now arises whether, as Levy³ thinks probable, Justinian or one of his immediate predecessors had, prior to 531, abolished extensive process-consumption as between joint mandators, though the constitution by which this reform was accomplished has not been preserved. As against this view, two objections may be raised: (i) Why should extensive process-consumption have been abolished as between joint mandators before it had been abolished as between other correal debtors? (ii) If such a constitution as Levy imagines had actually been made, it is somewhat surprising that the Compilers of the Code should not have regarded the same worthy of preservation. I therefore venture to think that the reference in C. (8. 40 (41)) 28 pr. may simply be to C. eod. 23, attributed to Diocletian.

The last-mentioned constitution cannot in its

¹ Cp. also sch. τοῦ αὐτοῦ to Bas. XXIII. I. 44 (*Heimb.* II., p. 641 (3) i. m.); Levy, *Konk.*, p. 200 f.

² *Vide supra*, p. 184, n. 3.

³ *Konk.*, p. 200; *Sponsio*, p. 211, n. 2.

present form be genuine, and the awkward passage "vel satis . . . liberetur" may without hesitation be attributed to the Compilers.¹ But even this elimination does not remove all difficulty from the constitution. In the first place, what is the precise significance of the words "simpliciter acceptos," which, we must assume, refer to "mandatores" alone, though grammatically they might refer to "reos principales" also? Levy² interprets these words in the sense that the mandators have been taken bound simply *consensu*, no stipulation being interposed, the cites by way of comparison C. (5. 12) 6 of the year 236: "conventionem simplici." I venture, however, to regard it as more probable that the absence of any agreement giving the mandators a beneficium excussionis is here referred to, in which case we can have little difficulty in attributing the words in question to the Compilers. In the second place, we note that the phrase "reos principales vel mandatores eligere" can hardly, as might at first sight be thought, mean "to elect any one or more of the various principal debtors and mandators taken as a whole"; literally it reads "to elect the principal debtors or the mandators," and the meaning apparently is "to choose between suing the one group (or any one or more members thereof) or the other group (or any one or more members thereof)." Accordingly, we seem entitled to conjecture that Diocletian's original rescript may have proceeded on somewhat the same lines as that of Alexander C. (5. 57) 1.³

Be all this as it may, the fact remains clear that the Compilers interpolated c. 23, so as to eliminate extensive process-consumption both as

¹ Levy, *Konk.*, p. 201 f.

² *Sponsio*, p. 214, n. 1.

³ Cp. *supra*, p. 141, n. 1.

between principal debtors and as between joint mandators.¹ Under these circumstances I suggest that the words "quemadmodum in mandatoribus statutum est" in c. 28 pr. may simply refer to c. 23, the latter in its interpolated form being thus endowed with legislative force. It seems very likely that c. 28 in its present shape is the work of the Revisers of the Code in 534. Justinian's original constitution abolishing extensive process-consumption as between fideiussors² may have begun with the words "generali lege sancimus" in § 1, and it seems almost certain that the abolition of extensive process-consumption as between principal correal debtors was accomplished by means of a separate constitution, which the Revisers of the Code incorporated in c. 28 as § 2.³ Certainly the reference, in c. 28 pr., to c. 23 as having abolished extensive process-consumption between joint mandators, was not very happy; for c. 23 might equally well be referred to as having abolished extensive process-consumption between principal correal debtors (*reos principales*), though this latter reform was actually carried by § 2 of c. 28 itself. Experience, however, teaches us that we may expect anything from the Compilers.

¹ It is hardly necessary to remind the reader that a process-consumption relation could never exist between a principal debtor and a mandator, as their obligations originated from different causes; cp. Julian. D. (46. 1) 13 (*supra*, p. 183): "si mandatu meo Titio decem credideris et mecum mandati egeris, non liberabitur Titius"; Paul. eod. 71 pr.: "quamvis enim iudicio convento principali debitore mandator non liberetur."

² And also between a principal debtor and a fideiussor.

³ Cp. *supra*, p. 226 f.

(6) D. (46. 1) 52. 3. Papinian. XI. respons.

α. Plures eiusdem pecuniae credendae mandatores $< - >$ ¹

β. si unus iudicio eligatur, [absolutione] $< \sim >$ ²
quoque secuta $< - + >$,³ non liberantur
[sed] omnes [liberantur pecunia soluta]:

γ. $< - >$ ⁴

Any attempt to uphold the genuineness of this paragraph in its present form is out of the question. Under the classical law, if litiscontestation with the one mandator, M., does not free the other, S., any suggestion that an absolutory judgment in favour of M. could do so, borders on absurdity.⁵ On the other hand, the subsequent decline and final abolition of extensive process-consumption brought the question as to the effect of an absolutory judgment into prominence. Suppose M. and S. are correal debtors and the creditor sues M. in solidum, litiscontestation in this action does not now free S.; but what is the position if the judge absolves M. on a ground which is not merely personal to the latter alone, but amounts to a denial of the existence of the correal obligation as a whole? If S. is subsequently sued, can he plead M.'s absolution as *res iudicata* in his (S.'s) favour? To this question a negative answer is given in the present paragraph. Accordingly, as the paragraph is meaningless from the standpoint of the classical law, but makes excellent sense from that of the Justinianian law, we are amply justified in attributing it, in its present form, to the Compilers.

¹ *separatim obligati sunt*: ² *condemnatione* ³ *et pecunia soluta*

⁴ *sed ei qui condemnatus solverit, creditor actiones suas adversus ceteros praestare debet.*

⁵ Unless indeed M. and S. stood in a relation of simple solidarity (*vide supra*, p. 232, n. 1). I do not, however, think it possible that this relation was under discussion here.

But what did Papinian write? At the present day, he is commonly believed to have written: "plures eiusdem pecuniae credendae mandatores, si unus iudicio eligatur, omnes liberantur."¹ Here it is assumed that the mandate is joint, and the elementary result is stated that litiscontestatio with one mandator frees the rest. But to this restoration there are a number of objections. In the first place, it is almost inconceivable that Papinian would have included such an elementary decision in his *Responsa*. In the second place, the restoration in question is far from elegant; we should have expected Papinian to have written "ex pluribus . . . mandatoribus" In the third place, as a case of "credit-mandate" is expressly in point, the words of the restoration are hardly compatible with Papinian's own statement in D. (27. 7) 7 that mandatores pecuniae credendae have a beneficium divisionis: "nam et si mandato plurium pecunia credatur, aequè dividitur actio."

Accordingly, I am much more inclined to favour the view of Eisele² that Papinian was here dealing with the case of separate mandates directed to the same juristic end, and that the denial of process-consumption is genuine. In point of fact, from the structure of the paragraph it seems highly probable that something has been omitted after "mandatores," and I suggest that Papinian may here have written: "separatim obligati sunt," or the like.

If this initial conjecture be accepted, then we may take Papinian. D. (46. 3) 95. 10³ as a model for our restoration, and I accordingly would reconstruct

¹ See, e.g., Levy, *Konk.*, p. 202 f.; *Sponsio*, p. 214 f. Krüger, *Dig.*, wrongly attributes this restoration to Eisele (see following note).

² *Archiv f. d. civil. Prax.*, 77, p. 461; this writer deletes "absolutione quoque soluta," but retains "non liberantur."

³ *Supra*, p. 183 f.

period β thus: "*si unus iudicio eligatur, condemnatione quoque secuta et pecunia soluta non liberantur omnes.*" Obviously, however, the mandatary, after having obtained full satisfaction of his interest from one of the mandators, cannot in equity recover anything further from the others; hence the point of the decision, as restored, must be that the mandator who has made payment can still obtain a cession of the mandatary's rights of action against the other mandators, for the purpose of working out proportionate regress.¹ We may therefore assume that Papinian continued somewhat as follows: "*sed ei qui condemnatus solverit, creditor actiones suas adversus ceteros praestare debet.*" So restored the paragraph agrees with our a priori conceptions as to the result where two or more parties give independent mandates directed to one and the same end. Legal solidarity, whether correal or simple, is excluded through absence of unity of cause, and hence at law the result is cumulation. According to this view the Compilers have obliterated the classical distinction between a single joint mandate and several mandates directed to the same juristic end, and have made solutio-consumption operate extensively in each case alike.

Let us take a concrete example. Gaius asks Titius for a loan of x ; T. gets M. and S., each independently of the other, to give him mandates to lend x to G.; T. would be perfectly entitled to treat these mandates as unrelated, and on the strength of the one and the other to lend xx to G. But ex hypothesi G. only wishes to borrow x , and so on the strength of both mandates² a single sum of this amount alone

¹ Cp. *supra*, p. 322.

² Cp. D. (17. 1) 21: "*utriusque mandatum intuitus*"; it seems

is lent. If G. duly repays the x, then clearly nothing is due under either mandate, but suppose he fails to do so, what is the result? At first sight we might be inclined to say that T. must attribute v to the one mandate and v to the other. This solution must, however, be rejected; we cannot have partition without unity of originating cause.¹ M. and S. have each given a separate mandate to lend x, and each is responsible for the full amount. We next think of simple solidarity, but this result also is, we believe, excluded in the absence of unity of originating cause. The only alternative, then, is legal cumulation with equitable intervention to prevent the mandatarum recovering twice over. If T. recovers the full amount from one of the mandators, and subsequently sues the other, the iudex in the exercise of his bonae fidei officium is clearly bound to dismiss the action. Moreover, we think, the same result must normally take place even where T. has merely joined issue with the one; for equity, generally speaking, follows the civil law in admitting extensive process-consumption.² But neither solutio nor litiscontestatio prejudices the right of a mandator who makes payment to claim an assignment of the creditor's rights of action against the others for the purpose of enabling him to work out proportionate relief.³

The Justinianian system, on the other hand, raised to a legal status the purely equitable solidary relation which, under the classical system, had existed between mandatory obligations originating from different causes

probable that Ulpian was thinking more especially of the case of separate mandates when he wrote the final words of this fragment: "quemadmodum, si duo mihi mandassem ut tibi crederem, utrumque haberem obligatum."

¹ *Vide supra*, p. 154, n. 2.

² *Vide supra*, p. 193.

³ *Cp. supra*, p. 184, n. 4.

but directed to the same juristic end. In other words we now have a several solidary relation, as contrasted with the joint solidary relation where unity of originating cause is present. But both these relations are based alike on *solutio-consumption*. Hence the Compilers, by deleting, as we suppose, the reference to the separate origins of the two mandates, have given our present paragraph D. (46. 1) 52. 3 a perfectly general import.

I propose at this point to break off my present study on Solidarity and Correality. As indicated in § 3 above, my exposition does not pretend to be exhaustive, and a considerable number of other matters bearing on solidary relations remain to be dealt with in future studies. Meanwhile I shall conclude with three observations:—

(i) No one is more fully aware than myself of the entirely problematical nature of many of the views herein submitted and results herein attained. This defect is, however, inherent in all Roman law studies, for the condition of our sources excludes anything like certainty as regards much of the actual and detailed working of the classical system. We can, therefore, only “operate with probabilities,”¹ though, on the other hand, the combined efforts of different jurists approaching each subject from every possible standpoint cannot fail to reduce somewhat the wide margin of doubt. The great thing is to avoid anything in the nature of “unsound lecture-room jurisprudence”²; we must strive to enter into the

¹ The quotation is from a letter of Professor Riccobono's, and has a special relation to textual criticism.

² See Ihering quoted *supra*, p. 5 f.

spirit of the ancient law, and to present theories which at any rate contain a possibility of truth.

Under these circumstances I await with considerable interest the criticism which the conjectures contained in the present work cannot fail to evoke. I trust that those of my readers who detect flaws in my argument will let me have the benefit of their remarks as early as possible, so that, in the further studies which I propose shortly to publish, I may be able to retract the various errors into which I have doubtless fallen. I may observe, however, that, Roman law being now such a highly specialised subject of enquiry, the number of persons who are really competent to pronounce judgment on treatises like the present can never be very large. To those who do not belong to the inner circle of experts, I would recommend the exercise of, as Quintilian¹ says, a “*modestum et circumspectum iudicium*,” “*ne, quod plerisque accidit, damnent quae non intellegunt*.”

(ii) I feel constrained to add a warning which unfortunately is not altogether uncalled for even at the present day. If any one of us in this third decade of the twentieth century thinks fit to publish a work constructed on the bad old lines, a work which adheres to the unsound traditions of the so-called historical school of last century, which “fundamentally ignores the practical application of its subject,”² which pays scant attention to the all-important distinction between the classical and the Justinianian systems, which disregards the results of modern criticism where these upset the orthodox juridical faith hitherto prevailing—in such case, we may be certain of this, namely, that not only will our work be of no scientific value whatever, but will be positively prejudicial to

¹ *Inst. Or.* x. 1. 26.

² See Ihering, quoted *supra*, p. 5.

the advancement of true learning. But on the other hand, if we build on the critical foundation which writers of the present century, mainly German and Italian, have surely laid, and if we seek, with zeal and patience, to extend, in some branch of the law however small, the results so far attained—in such case, however many errors we may commit, our work can never be entirely futile. Indeed, our very errors may prove useful in pointing to some future enquirer the way which we ourselves have missed.

(iii) And let no *ignoramus* be ever heard to say that our studies are but the fruit of idle antiquarian or literary curiosity, and devoid of any practical value whatever. The truth of the matter is that legal science, to-day as much as ever before, draws its deepest inspiration from the jurisprudence of ancient Rome. Though the *Corpus Iuris* no longer holds the place of a legislative code, yet it remains “the copious and pellucid fountain-head of modern legal rules, and likewise the richest source of juridical doctrines.”¹ Its contents, supplemented by the other classical writings which have come down to us, still constitute the “canon of our juristic thought.”² “Law bears the mighty name of Rome.”³ But we must understand what Roman law really is ; we must attain a true valuation of the literary sources in which it is preserved ; we must appreciate the evolution which it passed through, and ascertain its guiding principles in the different historical periods. All this we at the present day are learning to do in a manner which our forefathers never so much as dreamt of, and every year enlarges the circumference of our knowledge.

¹ Riccobono, ZSS., 43, p. 263. ² Ihering, *Gheist d. röm. Rechts*, I., p. 2.

³ Riccobono, *op. cit.*, p. 379.

The task of striving to "add a small stone to the edifice which has to be constructed out of the materials of the *Corpus Iuris*, without disturbing the glorious majesty of that monumental work" ¹ is surely no unworthy one, and it is much to be desired that legal scholars in English-speaking countries would take up this task with greater zeal than they have hitherto displayed. In the past, the scant attention paid in this country to those branches of legal science which transcend the immediate necessities of everyday practice, gave occasion to the charge, "England sleeps for ever." ² It is for us of the present generation, each within his own department, to prove this charge totally unfounded.

¹ Riccobono, *op cit.*, p. 380.

² See Bryce, *Studies in History and Jurisprudence*, II., p. 497.

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